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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 75

CARLIN CONSTANTINE VENUS, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 1, 1961
CERTIORARI GRANTED MAY 15, 1961

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 75

CARLIN CONSTANTINE VENUS, PETITIONER,

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[fol. 2] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

JULY, 1957, GRAND JURY—SOUTHERN DIVISION

No. 26877-SD

UNITED STATES OF AMERICA, Plaintiff,

vs.

CARLIN CONSTANTINE VENUS, Defendant.

(U.S.C., Title 50, App., Sec. 462-(a); Universal Military Training and Service Act.)

INDICTMENT—Filed August 8, 1957

The Grand Jury charges:

Defendant CARLIN CONSTANTINE VENUS, a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 140, said board being then and there duly created and acting, under the Selective Service System established by said act, in San Diego County, California, in the Southern Division of the Southern District of California; pursuant to said act and the regulations promulgated thereunder, the defendant was classified in Class 1-A and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on November 8, 1955 in San Diego County, California, in the division and district aforesaid; and at [fol. 3] said time and place the defendant did knowingly fail and neglect to perform a duty required of him under

said act and the regulations promulgated thereunder in that he then and there knowingly failed and neglected to report for induction into the armed forces of the United States as so notified and ordered to do.

A True Bill

Charles E. Arnold, Foreman.
Foreman

Laughlin E. Waters, United States Attorney.

[fol. 4] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION
September, 1959, Grand Jury
No. 28989 CD

UNITED STATES OF AMERICA, Plaintiff,

v.

CARLIN CONSTANTINE VENUS, Defendant.

INDICTMENT—Filed December 23, 1959

[50 U.S.C., App., § 462(a)—Universal Military Training and Service Act]

The Grand Jury charges:

Count One

[50 U.S.C., App. § 462(a)]

Defendant Carlin Constantine Venus, a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said Act and the regulations promulgated thereunder and thereafter became a registrant of Local Board

No. 140, said Board being then and there duly created and acting under the Selective Service System established by said Act in San Diego County, California, in the Southern Division of the Southern District of California; that pursuant to said Act and the regulations promulgated thereunder, the defendant Carlin Constantine Venus was classified 1-A and was notified of said classification; that thereafter a no-[fol. 5] tice and order by said Board was duly given to the defendant Carlin Constantine Venus to report for induction into the Armed Forces of the United States of America on November 8, 1955, in San Diego County, Calif., in the division and district aforesaid; that at said time and place, the defendant Carlin Constantine Venus failed and neglected to report for induction; that defendant Carlin Constantine Venus thereafter had a continuing duty from day to day under said Act and the regulations promulgated thereunder to report to said Board for induction into the Armed Forces of the United States; that on or about April 9, 1956, the defendant Carlin Constantine Venus, in the division and district aforesaid, knowingly failed and neglected to perform said continuing duty required of him under said Act and the regulations promulgated thereunder, in that he knowingly failed and neglected to report to said Board for induction into the Armed Forces of the United States.

[fol. 6] Count Two

[50 U.S.C., App. § 462(a)]

Defendant Carlin Constantine Venus, a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said Act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 140, said Board being then and there duly created and acting under the Selective Service System established by said Act in San Diego County, California, in the Southern Division of the Southern District of California; that pursuant to said Act and the regulations promulgated thereunder the defendant Carlin Constantine Venus thereafter had a duty to keep said Board advised at all times of the address where mail would reach him; that on or about February 1,

1955, in the division and district aforesaid, the defendant Carlin Constantine Venus knowingly failed and neglected to perform said duty required of him under said Act and the regulations promulgated thereunder in that he knowingly failed and neglected to keep said Board advised of the address where mail would reach said defendant.

A True Bill

Earle E. W. Duncan, Foreman.

Laughlin E. Waters, United States Attorney.

[fol. 7] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

No. 23989 CD

[Title omitted]

NOTICE OF MOTION TO DISMISS—Filed December 29, 1959

To the plaintiff, United States of America, and to Laughlin E. Waters, United States Attorney, and Peter J. Hughes, Deputy United States Attorney, and Elmer Enstrom, Deputy United States Attorney, and Robert D. Hornbaker, Deputy United States Attorney:

Please Take Notice:

That upon the affidavit of Carlin Constantine Venus, sworn to the 29th day of December, 1959, a copy of which is attached hereto and upon the pleadings, papers and files herein, the undersigned will move this Court at the Court House, at 325 West "F" Street, San Diego, California, on Monday, January 4, 1960, at the hour of 10:00 o'clock A.M., or as soon thereafter as counsel can be heard for an order requiring that the indictment returned in this cause on December 23, 1959, be quashed and dismissed.

Dated: This 29th day of December, 1959.

Hayden C. Covington, 127 Columbia Heights, Brooklyn 1, New York, Kenneth A. Barwick, 7918½ Broadway, Lemon Grove, California, By Kenneth A. Barwick, Attorneys for Defendant.

[fol. 8]

MOTION BY DEFENDANT TO DISMISS INDICTMENT

May It Please The Court:

Now comes the defendant and moves that the indictment returned in this cause on December 23, 1959, be dismissed on the following grounds;

The Court is without jurisdiction because the offense charged in the indictment is not brought in good faith, but was deliberately delayed by the United States Attorney to within six weeks of the expiration of the five year statute of limitations so as to prejudice the defendant and deny him of his rights to a speedy trial guaranteed by the Sixth Amendment to the United States Constitution, and the reasons therefor shall now be stated.

The defendant on June 7, 1954 wrote a letter to the local Draft Board, informing the local board as follows: 1) That defendant was moving from San Diego, California to Modesto, California. 2) That defendant's new address was 1431 10th Street. 3) That defendant could be reached within one or two days at the San Diego address. 4) Return address on envelope indicated defendant's parents' home address of 650-11th Street, San Diego, California. 5) That said letter and envelope carrying same were received by the local board on June 7, 1954; that the cover sheet of defendant's selective service file notes the new Modesto address and in parentheses on said cover sheet shows in brackets "see letter inside." A copy of the June 7, 1954 letter, the envelope containing same and the cover sheet referred to and attached hereto and made a part [fol. 9] herein as though set forth in full.

That defendant on April 9, 1956 wrote a letter to the local board informing them as follows: 1) That his new address was 756 Pier Avenue, Santa Monica, California. 2) That he was a pioneer minister of Jehovah's Witnesses and had been such since August, 1955. 3) He requested latest classification and any other information of which he should be aware. The Board received said letter on April 10, 1956. A copy of said letter and the envelope transmitting same are attached hereto and made a part herein as though set forth in full.

The defendant on August 21, 1956, wrote a letter to the local board informing the local board as follows: 1) That he had received no reply to his April 10, 1956 letter. 2) Defendant again asked for latest classification and other information of which he should be aware. 3) He stated that he had mailed a change of address at the start of last year (i.e. 1955) stating his new address to be 1120-30th Street, San Diego, California, the home of his parents. A copy of said letter is attached hereto and made a part herein as though set forth in full.

On October 2, 1956, the United States Attorney for the Southern District of California telephoned the local board and discussed the alleged delinquency of the defendant and notified the local board that the United States had decided not to prosecute Venus for failure to keep his local board informed of his whereabouts or where mail would reach him.

On June 12, 1957, the United States Attorney wrote the Selective Service Board No. 140 regarding the defendant's failure to report and his claim that he had notified the board of his change of address. The United States Attorney notified the local board in said letter that they declined to prosecute because said United States Attorney's office felt that a jury would probably have a reasonable doubt as to the defendant's guilt.

[fol. 10] The copy of the letter of June 12, 1957 is attached hereto and made a part herein as though set forth in full.

The defendant was indicted by the grand jury for the United States District Court for the Southern District of California for an alleged offense of failing to report for induction into the armed forces as ordered to do so by his local board on November 8, 1955, which indictment was

filed on August 8, 1957. The indictment charged an offense under the Universal Military Training and Service Act, which is the identical act under which the present new indictment was returned against the defendant in this case on December 23, 1959, the said offenses as alleged in both counts of the indictment arose out of the same transaction. The United States Attorney for the Southern District of California has been in possession of the Draft Board file, which shows the above facts stated in this motion, since August 29, 1956, and said United States Attorney had attempted on three separate occasions to convict and imprison the defendant under the said indictment filed on August 8, 1957. The United States Attorney has had notice of the facts above alleged for a period of over three years before the indictment was returned in this case and has wholly failed to take any action within the statutory period of limitation.

The United States Attorney brought the defendant to trial during the month of December, 1959, and said third trial resulted in a second hung jury. It was not until said United States Attorney failed on three separate occasions to get a conviction and had obtained two hung juries in the prosecution under the indictment charging the defendant with a failure to report for induction that he, for the first time, more than three and one-half years after he had received notice from the local board that the defendant was an alleged delinquent for failure to keep his local board informed of the place where he could be reached by United States mails, caused defendant to be indicted on this charge. [fol. 11] The defendant further states that he has attended three trials in cause No. 26877-SD styled *United States* v. *Venus*, and that at the third trial in December, 1959, Mrs. Helen Haisch, the chief clerk of the local board No. 140, testified that she had read the letter of June 7, 1954, and made the notations found on the cover sheet "see letter inside" based on her belief at the time of receiving said letter that defendant could always be reached at his parents' home as shown by the return address on the envelope carrying said June 7, 1954 letter. That defendant heard Mrs. Haisch testify a all three previous trials that no effort was ever made by any person connected with the

Draft Board in an attempt to locate defendant at any address whatsoever, including the San Diego address contained on the envelope conveying the June 7 letter of 1954.

It is manifest upon the record that the United States Attorney in the three separate trials in cause No. 26877-SD, styled *United States* v. *Venus* is familiar with said case and has now acted without good faith and for an unlawful and illegal purpose to deny the defendant his right to a speedy trial. The sole purpose of the delaying action of the United States Attorney was to deprive the defendant of his rights under the Sixth Amendment to the United States Constitution.

Wherefore, the defendant prays that the Court, upon a consideration of this motion, dismiss the indictment returned and filed in this case on or about December 23, 1959, charging the defendant with the offense of failure to keep the local board informed of his whereabouts for the reason that the delayed prosecution of the indictment is a violation of the rights guaranteed to the defendant under the Sixth Amendment to the United States Constitution for a speedy trial of said offense, which has been deliberately [fol. 12] delayed by the United States Attorney for the Southern District of California for a period of more than four years.

Hayden C. Covington, 124 Columbia Heights, Brooklyn 1, New York. Kenneth A. Barwick, 7918½ Broadway, Lemon Grove, California, By: Kenneth A. Barwick, Attorneys for Defendant.

Duly sworn to by Carlin Constantine Venus, jurat omitted in printing.

June 7 1951

Local Board 143
For Theater Bldg. No 2
1215 7th Avenue
San Diego, Calif.

LOCAL BOARD NO. 143
San Diego County
JUN 7 1951
Room 205, 1215 7th Ave.
San Diego 1, California

Gentlemen and Ladies

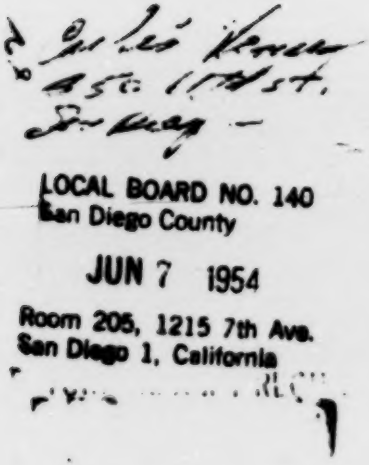
At this time I wish to inform you of my departure from San Diego to Modesto, Calif. there I received employment as a federal Bureau of Investigation and have notified, when in Los Angeles after induction procedure. My new address is (Same employ) 1431 10th St. Modesto, Calif, but can be reached within one or two days at my San Diego address.

Thanking all of you,

I remain respectfully,
Charles Ernest

[fol. 13]

ATTACHMENT TO MOTION



Local Board 140
For Induction Use
1215 7th Ave
San Diego
Calif

Selective Service System

152

SELECTIVE SERVICE NUMBER	DATE OF BIRTH
4 140 29 578	Dec. 19, 1929

Name Ybarra, Carlos Constantine
(Last) (First) (Middle)

Address 184 National Ave.
(City or town) Chula Vista (County) Calif. (State)

Telephone _____ Race Wh.

523

(EMERGENCY DECENTRALIZATION AREA)

U. S. GOVERNMENT PRINTING OFFICE

LOCAL BOARD NO. 140
Room 222, 525 E Street
San Diego, California
(Stamp of Local Board)

COVER SHEET

Date of registration 15 Sept 1948

Date of mailing Questionnaire MAY 13 1949

CHANGES OF ADDRESS:

1. 949 Highland Ave. 8-2-50
(Number and street or R. F. D. number) (Date)
National City Calif.
(City, town, or village) (Zone) (State)

2. 4591 Point Loma Ave, 1-18-51
(Number and street or R. F. D. number) (Date)
San Diego 7 Calif.
(City, town, or village) (Zone) (State)

3. 650 11th St 6-8-52
(Number and street or R. F. D. number) (Date)
San Diego Calif
(City, town, or village) (Zone) (State)

4. 3175 Cedar St. 1-19-53
(Number and street or R. F. D. number) (Date)
San Diego Calif.
(City, town, or village) (Zone) (State)

5. 650 11th St.
(Number and street or R. F. D. number) (Date)
San Diego, Calif.
(City, town, or village) (Zone) (State)

6. 1431 - 10th St. 6-7-54
(Number and street or R. F. D. number) (Date)
Modesto Calif. (Def. Area inside)
(City, town, or village) (Zone) (State)

(Number and street or R. F. D. number) (Date)

CLASSIFICATION

DATE	CLASS	DATE OF EXPIRATION
JUL 11 1950	1A	
OCT 27 1950	3-A	
SEP 14 1951	2-197	
NOV 7 1951	1-A	
JAN 9 1952	1-A-O	
FEB 27 1952	2-A	8-29-52
SEP 24 1952	1-A	
OCT 15 1952	2-A	4-15-53
JAN 7 1953	1-A	
4-19-54	1-A Appeal	

LOCAL BOARD NO. 140
San Diego County
Room 403, 424 - 7th Ave
San Diego 1, California

Carlin Venus
756 Pier Ave, #1
Santa Monica, Calif
April 9,1956

Local Board #140
Fox Theater Bldg.
San Diego, Calif

Re:#S-140-29-578

Dear Sirs:

This is to notify you of my new address. It is: 756 Pier Ave, Santa Monica, Calif.

For your added information as to my present activities, I am a pioneer minister assigned by the Watchtower Bible & Tract Society to serve in that capacity in the Venice Congregation, Ocean Park Unit of Jehovah's Witnesses and have been such since August, 1955.

Please send my latest classification and any other information of which I should be aware.

The message contained in this enclosed tract will, I hope, be of comfort to you and serve to increase your understanding of world conditions in the light of bible prophecy.

Thank you for any consideration shown in my behalf.

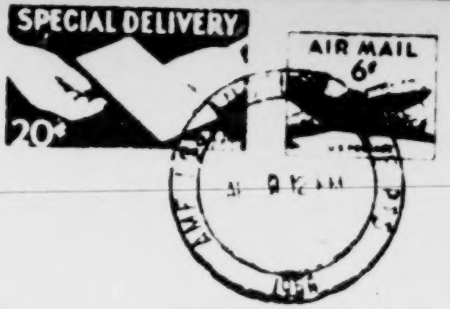
Sincerely;

Carlin Venus
Ordained Minister of God

P.S. I was married on December 31, 1955.

RJS/CV

Carlin Venus
756 Pier Ave. # 1
Santa Monica, Calif.



LOCAL BOARD NO. 140
San Diego County

APR 10 1956

Room 205, 1215 7th Ave.
San Diego 1, California

Local Board # 140

Fox Theater Bldg.

San Diego, Calif.

AIR MAIL
SPECIAL DELIVERY

SAN DIEGO
APR
AM
1956

LOCAL BOARD NO. 140
San Diego County

AUG 27 1956

Room 205, 1215 7th Ave.
San Diego 1, California

Carlin Venus
766 Pier Ave. #1
Santa Monica, Calif.
August 21, 1956

Local Board #140
Fox Theater Bldg.
Room 205, 1215 7th Ave.
San Diego 1, California

Re: # 4-140-29-678

Dear Sirs:

Referring to my last letter to you dated and mailed April 9,1956, I received no reply. Among other information presented in said letter was a request which is as follows..."Please send my latest classification and any other information of which I should be aware.

This will be my last letter to you unless future circumstance requires correspondence.

Pertaining to the above mentioned, please consider.

Sincerely,

Carlin Venus
Ordained Minister of God

P.S. In connection with previous adress. I mailed a card to you with my address as ... 1120 30th St. San Diego, Calif. at the start of last year.

Copies mailed to Ass't U. S. Attorney
and FBI this date-- 8/27/56

14

[fol. 18]

ATTACHMENT TO MOTION

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND FILE NUMBER

HDS/mfk

23886-CD

United States Department of Justice

UNITED STATES ATTORNEY

SOUTHERN DISTRICT OF CALIFORNIA
U. S. CUSTOM HOUSE AND COURT HOUSE BUILDING
SAN DIEGO 1

June 12, 1957

LOCAL BOARD NO. 140
San Diego County
JUN 14 1957
Room 205, 1215 7th Ave.
San Diego 1, California

Selective Service Board
Local Board 140
Fox Theatre Building

Re: U.S. -vs- CARLIN CONSTANTINE
VENUS - No. 23886-CD

Dear Sir:

The above matter was referred to this office for prosecutive opinion and a review has been made of the facts and circumstances. The facts disclose that the subject was reclassified 1-A and a notice of such classification was sent to the defendant at his last reported address in Modesto, California. Thereafter, on October 28, 1955, an Order to Report for Induction was mailed to the subject at his Modesto address. The order for the subject was to report for induction on November 8, 1955. The subject failed to report as ordered. The subject was interviewed by the Federal Bureau of Investigation and stated that he had not received the Notice of Classification or the Order to Report for Induction. He further stated that he believed he had notified the Local Draft Board that he could be reached in care of his parents at San Diego. No such notice was received by the Local Board. Subsequently, the subject in a letter to the Local Board stated that he notified the Local Board in February of 1955 that all mail was to be sent to his parents' address in San Diego. No such notice was received by the Local Board.

If the subject's story was to be believed we would have to believe that the Classification Card and the Order to Report for Induction sent to Modesto, California, was not forwarded to him and was not returned to the Local Board by the Post Office; that the notice which he sent to the Local Board in February of 1955 was lost in the mail or was misplaced. The government would be

[fol. 19]

ATTACHMENT TO MOTION

relying upon the regulations which provide that a letter mailed to the last known address provides sufficient notice under the Selective Service Law and further the presumption of regularity and the presumption that a letter deposited in the United States Mail is delivered to the person to whom it is addressed if not returned.

It is our opinion that in view of the fact that in a criminal prosecution a defendant must be proved guilty beyond a reasonable doubt, a jury would probably have a reasonable doubt that the defendant had received the Order to Report for Induction, in view of the subject's anticipated direct testimony to the effect that he did not receive the Order to Report for Induction. Consequently, prosecution is declined. You are permitted to remove the subject's name from your Selective Service System form 302.

Yours truly,

LAUGHLIN E. WATERS
United States Attorney

Harry D. Steward

HARRY D. STEWARD
Assistant United States Attorney

cc- FBI, SD (Doyle)

LOCAL BOARD NO. 140
San Diego County
JUN 14 1957
Room 208, 1219 7th Ave.
San Diego 1, California

[fol. 21] Affidavit of Service by Mail (omitted in printing).

[fol. 51] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

No. 28989-SD Criminal

[Title omitted]

Defendant's Requested Jury Instructions —Filed May 10, 1960

Comes Now the defendant, Carlin Constantine Venus, and respectfully submits the attached Jury Instructions and requests that the Court give the same.

Respectfully submitted,

Hayden C. Covington and Kenneth A. Barwick, Attorneys for Defendant.

[fol. 95]

DEFENDANT'S NO. 45

You are instructed, that if you find or believe or have a reasonable doubt thereof, that the testimony of the Government's witnesses that the postal card was not received by the board is based upon the fact that such witness or witnesses failed to find it in the file when the file was examined by such witnesses after the date of mailing of such card, then you are instructed that you cannot find that the presumption that the card was received by the board has been rebutted and you may find that it was actually received by the board. You cannot rely upon the presumption that the draft board employees performed their duties in handling the card solely because it was not found in the file. The presumption that the employees do their duty cannot substitute for the burden that is upon the Government to show by clear and convincing evidence beyond a reasonable doubt that the card was not

received and which must be established by witnesses whose duty it was to process the incoming mail or who actually did handle and process the mail at the time in question.

Given .....
Given .....
Given as Modified .....

[fol. 96]

DEFENDANT'S No. 46

There is a presumption of fact that the card mailed by the defendant, if you find it was properly mailed as heretofore instructed, was actually received by the local board. This presumption of the receipt of the card by the local board cannot be overcome or rebutted by the presumption that the board employees performed their duty in handling the mail received by the board, but the burden is upon the Government to prove by testimony of employees of the board whose duty it is to process incoming mail that the card actually was not received by the board.

Given as Modified .....
Refused .....
Refused .....

[fol. 171] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

No. 28989-Criminal

[Title omitted]

VERDICT—Filed May 14, 1960

We, the Jury in the above-entitled cause, find the defendant Carlin Constantine Venus, ... as charged in count 1 of the Indictment, and Guilty as charged in count 2 of the Indictment.

Edward W. Stahl, Foreman of the Jury.

Dated: May 14th, 1960 at San Diego, California.

[fol. 172]

[fol. 172] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

No. 26877 SD Criminal

No. 28989 SD

[Title omitted]

NOTICE OF MOTION BY DEFENDANT FOR A NEW TRIAL —Filed May 19, 1960

To the plaintiff, United States of America, and to Laughlin E. Waters, United States Attorney, and to Robert Hornbaker, Deputy United States Attorney,

Please Take Notice:

That upon the affidavits filed herewith, copies of which are attached hereto, and upon the pleadings, papers and files herein, the undersigned will move this Court at the Court House, at 325 West "F" Street, San Diego, California, on Tuesday, May 31, 1960, at the hour of 2:00 o'clock P.M., or as soon thereafter as counsel can be heard; 1) For judgment of acquittal. 2) For an Order granting a new trial.

Dated: This 17th day of May, 1960.

Hayden C. Covington and Kenneth A. Barwick, Attorneys at Law, By Kenneth A. Barwick, Attorneys for Defendant.

[fol. 173]

No. 26877 SD

No. 28989 SD Criminal

MOTION BY DEFENDANT FOR A NEW TRIAL

May It Please the Court:

Now comes the defendant and moves the Court for an order granting a new trial in this cause within the period fixed by Rule 33 of the Rules of Criminal Procedure and alleges the following grounds:

I

The Court committed reversible error in overruling the motion by defendant to dismiss the indictment.

II

The Court committed reversible error in overruling defendant's amended motion to dismiss the indictment which was filed by leave of Court on the first day of the trial of this case.

III

The Court committed reversible error in overruling motion for judgment of acquittal that was made at the end of all the evidence and each and every ground thereof is incorporated herein as though copied at length in this motion for new trial.

IV

The Court committed reversible error in overruling motion for judgment of acquittal that was renewed after the verdict of the jury upon the third count.

V

The Court committed reversible error in accepting the [fol. 174] verdict of the jury upon the third count when

the jury had disagreed and refused and failed to return a verdict on the first and second counts, which are the original indictment and the first count of the second indictment returned against the defendant in this case, which has denied defendant of his rights to procedural due process of law and forces defendant to stand trial piecemeal upon the transaction in this case, and denies him of his rights to plead former jeopardy, all contrary to the Constitution and the laws of the United States.

VI

The Court committed reversible error in quashing the subpoenas duces tecum issued to Robert Hornbaker, Assistant United States Attorney, and T. Oscar Smith, Assistant Attorney General, commanding the production of the hearing officer's report, for the reasons which were stated by counsel at the oral argument upon the Government's motion to quash.

VII

The Court committed reversible error in quashing the subpoena duces tecum commanding the production of the FBI report by the Special Agent of the Federal Bureau of Investigation that interviewed the defendant on April 9, 1956 concerning his failure to keep the local board informed of the address where mail would reach him.

VIII

The Court committed reversible error in quashing the subpoenas duces tecum commanding the production of the original FBI reports described in the subpoenas issued to Robert Hornbaker, Assistant United States Attorney, and the Special Agents in Charge of the Los Angeles and San Diego offices of the Federal Bureau of Investigation.

IX

The Court committed reversible error in ruling that no [fol. 173] evidence of any kind or character could be of-

fered by the defendant and also in ruling that all evidence offered by the defendant should be excluded which pertained to any transaction between defendant and the local board after June 9, 1956, mention of which evidence excluded and offered by defendant related to his bona fides and good faith in providing the local board with an address where he could be reached by mail.

X

The Court committed reversible error in overruling the motion for judgment of acquittal specifically because defendant had on file with the local board a letter dated June 7, 1954, which informed the local board of an address at which he could always be reached by mail as is required by 32 C. F. R. § 1631.3, which said letter was interpreted by the clerk of the local board at the trial of this case to the same effect, so therefore the defendant, as a matter of law, cannot be held to have knowingly and wilfully failed to provide the local board with an address as to where mail could reach him.

XI

The Court committed reversible error in failing to declare a mistrial when the jury failed to reach a unanimous verdict upon the charges appearing in the first indictment and the first and second counts in the second indictment.

XII

The Court committed reversible error in refusing defendant's requested instructions 43, 45, 46, 47, 51, 52, 54, 55, 72 and 76.

XIII

The Court committed reversible error in charging the jury over the objections and exceptions that were taken to the charge of the Court, all of which appear in the [fol. 176] stenographic transcript of the objections and ex-

ceptions which here are referred to and made a part hereof as though copied at length herein, and which appear as an appendix to this motion.

XIV

This Court should grant a new trial in this case because of misconduct on the part of the foreman of the jury for lack of statutory qualifications inasmuch as he was deaf and appeared to have been a lip reader, and wholly failed to disclose to the Court or counsel during the extensive voir dire examination of respective jurors that he did not hear. The disqualification of the foreman of the jury did not become manifest until after the jury had retired and a knowledge of the deafness of the foreman of the jury was not known until after the verdict of the jury on the second count of the last indictment had been returned. During the time when the jury returned to the courtroom for a rereading of portions of the testimony, as requested by the jury, counsel for the defendant had suspicions about the ability of the foreman of the jury to hear clearly or at all since the trial judge had on several occasions to repeat his questions to the foreman of the jury and in repeating the questions the trial judge had to raise his voice and yell in a very loud tone of voice so that the foreman of the jury would hear, none of which had occurred at any previous time during the trial of the case and it was entirely too late for the defendant to challenge the qualification of the foreman of the jury since the case had been submitted to the jury and also the extent of the deafness of the foreman of the jury was not then manifest or known to the defendant or his counsel. Since the discharge of the jury the defendant has learned of the deafness of the foreman of the jury as a result of a telephone call that was made by one of the jurors to one of the counsel for the defendant on this date. The defendant has [fol. 177] caused to be gathered certain affidavits and statements in respect to the deafness of the foreman of the jury and also has shown the diligence on the part of the defendant and his counsel of being able to raise this question for the first time until after it was drawn to the at-

tention of defendant's counsel by telephone from one of the members of the jury. The defendant hereby incorporates and makes a part hereof the various papers and affidavits supporting the charge of defendant that the foreman of the jury was disqualified because of deafness, all of which are made part hereof as though copied at length herein. Upon the voir dire examination of the prospective jurors the trial judge asked each and every one of the prospective jurors if there was any reason of any kind or character that would disqualify any one of them from sitting in the case—which would certainly include the qualification of hearing and the lack of qualification due to deafness—which manifestly should have been considered by the foreman of the jury but who for some reason failed to disclose his disqualification and continued to sit throughout the entire case without divulging his disqualification and making known to the Court and counsel that he was not a qualified juror and that he was deaf and depended on lip reading for an understanding of what was said in his presence. Defendant has reason to believe, based on the information above stated, that the foreman of the jury was guilty of deception to the Court and counsel at the time of the voir dire examination and thereby deprived the defendant of his right of trial by jury, since the foreman of the jury knew that he was hard of hearing and neither the Court nor the defendant knew it. The defendant and his counsel were placed in a predicament and [fol. 178] were unable to discover the deafness of the prospective juror who turned out to be the foreman of the jury because of the procedure that is prescribed in the federal courts, namely, that the federal judge questions the jurors en masse or as a group and there was no individual interrogation of the said prospective juror on each question whereby he was allowed to answer each question in response to questions propounded by counsel or by the Court, and thereby the juror was enabled to conceal the fact that he was hard of hearing, stone deaf or a lip reader as above stated. The defendant states, on information and belief, that the foreman of the jury did not hear any of the material and relevant testimony and evidence

offered by the witnesses from the witness stand. The defendant believes that the foreman of the jury was compelled to speculate upon the evidence in order to reach a conclusion as to the guilt or innocence of the defendant and thereby did not properly discharge his oath as a juror in the case to render a true verdict.

Wherefore the defendant, having filed this motion within five days from the date of the verdict of the jury, prays the Court, upon a consideration hereof, to grant this motion and order a new trial for each and every one of the reasons above specified. The defendant prays for such other and further relief to which he may show himself justly entitled.

Hayden C. Covington, 124 Columbia Heights, Brooklyn 1, New York; Kenneth A. Barwick, 7918½ Broadway, Lemon Grove, California, By Kenneth A. Barwick.

[fol. 179] *Duly sworn to by Carlin Constantine Venus, jurat omitted in printing.*

[fol. 180]

No. 26877 SD Criminal

No. 28989 CD

AFFIDAVIT OF SARAH BAKER IN SUPPORT OF MOTION FOR A NEW TRIAL

State of California,
County of San Diego, ss:

Sarah Baker, being duly sworn, deposes and says:

Affiant resides at 4556 "F" Street, San Diego 2, California; that she was present in the above entitled Court on May 14, 1960, at approximately 6:20 o'clock P.M., when the jury in the above entitled matter returned to open court. Affiant states that she heard Judge James M. Carter,

presiding in the above entitled matter, ask the jury foreman, one Edward W. Stahl, whether or not the jury had arrived at a verdict. Affiant heard the aforesaid Judge Carter ask the jury foreman one or two other questions. Affiant observed that the aforesaid jury foreman, Edward W. Stahl, did not hear the questions when first propounded by the honorable Judge Carter; that affiant heard the Honorable Judge raise his voice so as to talk in a loud manner. Affiant further declares that it was only after the said Judge Carter raised his voice and spoke in a loud manner that the jury foreman, Edward W. Stahl, appeared to be able to comprehend the questions and re-
[fol. 181] marks of the Court. Affiant further states that when the attention of the jury foreman was finally obtained by the Court, the aforesaid jury foreman had to cup his hand behind his ear in order to hear the comments made by the Court and the questions propounded, even though such questions and comments were in an abnormally loud voice.

Affiant further states that she observed the other members of the jury and that no other member of the jury appeared to have any difficulty in hearing the Court's questions and comments or in responding thereto when so required.

Affiant further states that she was present during the course of the trial on May 10, 11, 12, 1960, and that at no time during the course of the trial did affiant observe that the aforesaid Edward W. Stahl appeared to have difficulty hearing. Affiant further states that the first time affiant was definitely appraised of the fact that Edward W. Stahl, jury foreman, as aforesaid, appeared to have hearing difficulty was at the time the jury returned with a verdict on May 14, 1960.

Executed at Lemon Grove, California, on this the 18th day of May, 1960.

Sarah Baker

Subscribed and sworn to before me on this 18th day of May, 1960.

Juanita R. Dye, A Notary Public in and for Said County and State.

My Commission Expires December 30, 1961.

[fol. 182]

No. 26877 SD Criminal

No. 28989 CD

AFFIDAVIT OF SONDRA H. VENUS IN SUPPORT OF MOTION FOR A NEW TRIAL

State of California,
County of San Diego, ss:

Sondra H. Venus, being duly sworn, deposes and says:

Affiant resides at 756 Pier, Apartment #3, Santa Monica, California; that she was present in the above-entitled Court on May 14, 1960, at approximately 6:20 o'clock P.M., when the jury in the above-entitled matter returned to open court. Affiant states that she was sitting in the rear of the court room and she observed and heard Judge Carter's comments and questions without any difficulty at all times; that said Judge spoke into a microphone, which was operating at all times hereinafter referred to. Affiant states that she heard Judge James M. Carter, presiding in the above-entitled matter, ask the jury foreman, one Edward W. Stahl, whether or not the jury had arrived at a verdict. Affiant states that she observed all the members of the jury except the aforementioned jury foreman, nod their heads as if to indicate yes, whereas the aforementioned jury foreman, who was looking directly at the judge, made [fol. 183] no comment, evidenced no bodily expression and so far as it appeared to affiant herein, had a blank look on his face, the eleven other members of the jury panel, upon hearing no response to the question propounded by the Court to the jury foreman, turned and looked at the

jury foreman. The jury foreman then leaned way forward in his chair and cupped his right hand behind his right ear. At that moment the Honorable Judge Carter repeated the question to the juror and it was only then that the juror appeared to hear and comprehend the question. The question when first propounded by the Court was audible throughout the whole courtroom and easily heard by the affiant herein who was sitting in the rear of the courtroom, a distance of double that from the judge to the jury foreman. The affiant further states that when the Honorable Judge Carter repeated the question to the jury foreman, the judge's voice was so loud that it reverberated throughout the whole court. Affiant further states that the jury foreman wore no visible hearing aid.

Affiant further states that she observed the other members of the jury and that no other member of the jury appeared to have any difficulty in hearing the Court's questions and comments or in responding thereto when so required.

Affiant further states that she was present during the course of the trial on May 10, 11, 12, 1960, and that at no time during the course of the trial did affiant observe that the aforesaid Edward W. Stahl appeared to have difficulty hearing. Affiant further states that the first time affiant was definitely appraised of the fact that Edward W. Stahl, jury foreman, as aforesaid, appeared to have hearing difficulty was at the time the jury returned with a verdict on May 14, 1960.

Executed at Lemon Grove, California, on this the 17 day of May, 1960.

Sondra H. Venus

Subscribed and Sworn to before me this 17 day of May, 1960.

Juanita R. Dye, Notary Public in and for Said County and State.

[fol. 184]

No. 26877 SD Criminal

No. 28989 CD

AFFIDAVIT OF ELEANOR ESPINOZA IN SUPPORT OF MOTION FOR A NEW TRIAL

State of California,
County of San Diego, ss:

Eleanor Espinoza, being duly sworn, deposes and says:

Affiant is a resident of the County of San Diego, State of California, and resides at 2296 Kearny Avenue, San Diego; that she was present in the above entitled Court on May 14, 1960, at approximately 6:20 o'clock P.M., when the jury in the above entitled matter returned to open court. Affiant states that she heard Judge James M. Carter, presiding in the above entitled matter, ask the jury foreman, one Edward W. Stahl, whether or not the jury had arrived at a verdict. Affiant heard the aforesaid Judge Carter ask the jury foreman one or two other questions. Affiant observed that the aforesaid jury foreman, Edward W. Stahl, did not hear the questions when first propounded by the honorable Judge Carter; that affiant heard the Honorable Judge raise his voice so as to talk in a loud manner. Affiant further declares that it was only after the said Judge Carter raised his voice and spoke [fol. 185] in a loud manner that the jury foreman, Edward W. Stahl, appeared to be able to comprehend the questions and remarks of the Court. Affiant further states that when the attention of the jury foreman was finally obtained by the Court, the aforesaid jury foreman had to cup his hand behind his ear in order to hear the comments made by the Court and the questions propounded, even though such questions and comments were in an abnormally loud voice.

Affiant further states that she observed the other members of the jury and that no other members of the jury appeared to have any difficulty in hearing the Court's ques-

tions and comments or in responding thereto when so required.

Affiant further states that she was present during the course of the trial on May 10, 11, 12, 1960, and that at no time during the course of the trial did affiant observe that the aforesaid Edward W. Stahl appeared to have difficulty hearing. Affiant further states that the first time affiant was definitely appraised of the fact that Edward W. Stahl, jury foreman, as aforesaid, appeared to have hearing difficulty was at the time the jury returned with a verdict on May 14, 1960.

Executed at Lemon Grove, California, on this the 18 day of May, 1960.

Eleanor Espinoza, Affiant

Subscribed and Sworn to Before Me on this the 18 day of May, 1960.

Juanita R. Dye, Notary Public in and for said County and State.

My Commission Expires December 30, 1961.

[fol. 186]

No. 26877 SD Criminal

No. 28989 CD

AFFIDAVIT OF ARTHUR W. BAKER IN SUPPORT OF MOTION FOR A NEW TRIAL

State of California,
County of San Diego, ss:

Arthur W. Baker, being duly sworn, deposes and says:

That affiant resides at 4556 F Street, San Diego 2, California; that he was present in the above entitled Court on May 14, 1960, at approximately 6:20 o'clock P.M., when the jury in the above entitled matter returned to open court. Affiant states that he heard Judge James M. Carter, presiding in the above entitled matter, ask the jury foreman, one Edward W. Stahl, whether or not the jury had

arrived at a verdict. Affiant heard the aforesaid Judge Carter ask the jury foreman one or two other questions. Affiant observed that the aforesaid jury foreman, Edward W. Stahl, did not hear the questions when first propounded by the Honorable Judge; that affiant heard the Honorable Judge raise his voice so as to talk in a loud manner. Affiant further declares that it was only after the said Judge Carter raised his voice and spoke in a loud manner that the jury foreman, Edward W. Stahl, appeared to be [fol. 187] able to comprehend the questions and remarks of the Court. Affiant further states that when the attention of the jury foreman was finally obtained by the Court, the jury foreman had to cup his hand behind his ear in order to hear the comments made by the Court and the questions propounded even though such questions and comments were in an abnormally loud voice.

Affiant further states that he observed the other members of the jury and that no other member of the jury appeared to have any difficulty in hearing the Court's questions and comments or in responding thereto when so required.

Affiant further states that he was present during the course of the trial on May 10, 11, 12, 1960, and that at no time during the course of the trial did affiant observe that Edward W. Stahl appeared to have difficulty hearing. Affiant further states that the first time affiant was definitely appraised of the fact that Edward W. Stahl appeared to have hearing difficulty was at the time the jury returned with a verdict on May 14, 1960.

Executed at Lemon Grove, California, on this the 18 day of May, 1960.

Arthur W. Baker, Affiant

Subscribed and Sworn to Before Me on this the 18 day of May, 1960.

Juanita R. Dye, Notary Public in and for said County and State.

My Commission Expires December 30, 1961.

[fol. 188] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

No. 26877 SD Criminal
No. 28989 SD

[Title omitted]

RENEWAL OF MOTION FOR JUDGMENT OF ACQUITTAL—
Filed May 19, 1960

May It Please the Court:

Now comes the defendant and moves the Court for a Renewal of Judgment of Acquittal for each and every one of the following reasons:

1. There is no evidence of guilt of the defendant as charged in the First Indictment.
2. The undisputed evidence shows that the defendant is not guilty as charged in the First Indictment.
3. The evidence is insufficient to support a verdict of guilty under the First Indictment.
4. The government has wholly failed to prove a prima facie case under the First Indictment.
5. There is no evidence of guilt of the defendant as charged in the First Count of the Second Indictment.
6. The undisputed evidence shows that the defendant is not guilty as charged in the First Count of the Second Indictment.

[fol. 189] 7. The evidence is insufficient to support a verdict of guilty under the First Count of the Second Indictment.

8. The government has wholly failed to prove a prima facie case under the First Count of the Second Indictment.

9. There is no evidence of guilt of the defendant as charged in the Second Count of the Second Indictment.

10. The undisputed evidence shows that the defendant is not guilty as charged in the Second Count of the Second Indictment.

11. The evidence is insufficient to support a verdict of guilty under the Second Count of the Second Indictment.

12. The government has wholly failed to prove a prima facie case under the Second Count of the Second Indictment.

13. The undisputed evidence shows that the defendant had on file with the draft board a letter, dated June 7, 1954, which showed a permanent address, San Diego, California, to which mail from the draft board would always reach him; that is to say, his parents' address, known as 650 Eleventh Street, San Diego, California, and, therefore, as a matter of law, the defendant cannot be guilty of failing to keep his draft board informed of an address where mail would always reach him.

14. The undisputed evidence shows that the Order to Report for induction was mailed to the wrong address; that is to say, the Modesto address instead of the San Diego address of 650 Eleventh Street, San Diego, California. Therefore, the defendant should be found not guilty on all three counts and the two indictments.

15. The undisputed evidence shows that the defendant is not guilty as a matter of law as charged in the First Count of the Second Indictment in that the evidence shows that he did not learn of the order to

[fol. 190] report for induction are facts giving rise to a continuing duty until late in the afternoon of April 9, 1956, at Santa Monica, California, making it impossible for him to carry out any continuing duty before the close of business on that date, which is the only date that the government can rely upon under the indictment based on a failure to perform a continuing duty.

16. The undisputed evidence shows that the defendant did not have a reasonable opportunity after learning of the continuing duty on April 9, 1956, in time to perform such duty and, therefore, the defendant is not guilty as a matter of law of failing to carry out such continuing duty.

17. The defendant is not guilty under Count Three, the Second Count of the Second Indictment, charging him with failing to keep the board notified of where mail would reach him because the undisputed evidence shows that he was living at Modesto, California, on February 1, 1956, the date charged in the indictment and he cannot be convicted for failing to notify the board of a change of address after February 1, 1956, and, had mail been sent to him from the board on or before February 1, 1956, it would have reached him at the Modesto address shown upon the draft board file.

18. The undisputed evidence shows that the Order to Report for Induction was not actually deposited in the mails and there is no proof of an invariable office custom of mailing of the Order to Report for Induction by any competent witness and, therefore, there is not a valid order supporting the indictment.

19. The undisputed evidence shows that the card notifying the defendant of his classification, which is al-
[fol. 191] leged to have been mailed on September 2, 1955, was not mailed to San Diego but was directed to the wrong address in Modesto, and, therefore, the

defendant was denied his rights to take an appeal or request a personal appearance and, otherwise, exhaust his remedies as provided for in the regulations.

20. The undisputed evidence shows that the defendant was denied his rights to exhaust his remedies by the local board in mailing the Order to Report for Induction to the right address and the defendant has, therefore, been denied substantial rights to make his defenses as guaranteed by law.

21. Section 1632.14 of the Selective Service Regulations, upon which the First Count of the Second Indictment is based, providing among other things that it is the duty of the defendant from day to day to report to his local board, is unconstitutional, as construed and applied, because it denies the defendant due process of law contrary to the Fifth Amendment to the United States Constitution.

22. Section 1642.2 of the Selective Service Regulations, upon which the First Count of the Second Indictment is based, providing among other things that it is the duty of the defendant from day to day to report to his local board, is unconstitutional, as construed and applied, because it denies the defendant due process of law contrary to the Fifth Amendment to the United States Constitution.

23. Section 1632.14 of the Selective Service Regulations providing that the defendant has a continuing duty from day to day to report for induction is vague, indefinite, constitutes a dragnet, does not enable the [fol. 192] defendant to ascertain the time when the continuing duty arose or when it ended, it enables the government, the Court and the jury to speculate as to what act constitutes a violation of the law and it enables the government to charge the defendant with a violation of the act under circumstances when it is impossible to perform a duty required of him

under the act and for each and every one of these reasons, the regulation and the act making such regulation applicable, as construed and applied, is unconstitutional and void, contrary to the Fifth Amendment to the United States Constitution.

24. Section 1642.2 of the Selective Service Regulations providing that the defendant has a continuing duty from day to day to report for induction is vague, indefinite, constitutes a dragnet, does not enable the defendant to ascertain the time when the continuing duty arose or when it ended, it enables the government, the Court and the jury to speculate as to what act constitutes a violation of the law and it enables the government to charge the defendant with a violation of the act under circumstances when it is impossible to perform a duty required of him under the act and for each and every one of these reasons, the regulation and the act making such regulation applicable, as construed and applied, is unconstitutional and void, contrary to the Fifth Amendment to the United States Constitution.

25. Section 1641.3 of the Selective Service Regulations, providing that the defendant is charged with conclusive notice of the contents of the 1-A Classification of the Selective Service card, mailed on September 2, 1955, and the contents of the Order to Report for Induction, mailed on October 28, 1955, is unconstitu- [fol. 193] tional and void, as construed and applied, because it enables the Court and the Jury to convict and sentence the defendant under the act without due process of law and enables the jury to convict and the Court to sentence without proof of any knowing violation of the law by the defendant, all contrary to the "fair" and "just" provisions of the act and the due process clause of the Fifth Amendment to the United States Constitution.

26. The final 1-A Classification by the local board is arbitrary and capricious because there is a denial

of the ministerial classification and the conscientious objector classification under the act and regulations without basis and fact, thereby making the final order to report for induction void.

27. There is a denial of procedural due process before the local board in making the final classification because the local board followed the recommendation of the Department of Justice appearing in the file that the defendant be denied his conscientious objector status because of his belief in self defense and theocratic warfare.

28. The defendant was denied procedural due process of law by the Department of Justice hearing officer who denied him, upon a conscientious objector hearing, the right to a full and fair hearing, the right to explain the reasons for his "yes" or "no" answers, insisted upon by the hearing officer, and because the hearing officer was personally prejudiced against Jehovah's Witnesses and all other persons having conscientious scruples against the performance of military service.

29. The defendant was denied procedural due process of law by the Department of Justice because it with- [fol. 194] held favorable evidence appearing in the original FBI reports supporting his sincerity and his conscientious objector claim which would have supported the defendant's conscientious objector claim before the local board at the time of the last classification of the defendant.

30. The defendant was denied procedural due process of law because the formal typewritten report of the hearing officer was not included in the draft board file, contrary to the act and the regulations and because the amended regulation providing for the exclusion of the hearing officer's report, is void because it is in conflict of the act and prior regulations approved by Congress when the act was prepared in 1948 and reenacted in 1951.

Wherefore, the defendant prays that a Judgment of Acquittal be rendered and entered on all three counts.

Respectfully submitted,

Hayden C. Covington, 124 Columbia Heights, Brooklyn 1, New York, Kenneth A. Barwick, 7918½ Broadway, Lemon Grove, California, By Kenneth A. Barwick.

[fol. 195]

In United States District Court for the

Southern District of California

Southern Division

No. 28989—Crim.
No. 26877—Criminal

United States of America

vs.

Carlin Constantine Venus

Minute Entries of the Court—May 31, 1960

At: San Diego, California

Present: Hon. James M. Carter, District Judge.
Deputy Clerk: William W. Luddy Reporter: John Swader.
U.S. Attorney by Ass't Atty: Robert Hornbaker.
Counsel for the defendant: Kenneth Barwick.

Defendant is present O/R

Proceedings:

Hearing motion of deft for order granting motion for new trial

Hearing motion deft for judgment of acquittal
Hearing report P/O and Sentence ct. 2 case 28989
Further proceedings ct 1, case 28989, and 26877.

Attorney Barwick argues in support of motion for judgment of acquittal.

Attorney Hornbaker argues in opposition.

It Is Ordered that said motion for judgment of acquittal is denied.

The court on its own motion dismissed Indictment No. 26877, and Count 1 of case 28989, in the interests of justice.

Attorney Barwick argues in support of motion for new trial.

It Is Ordered said motion is denied.

Attorney Barwick moves to have Foreman of the Jury examined by an ear specialist, and It Is Ordered said motion is denied.

Court Sentences defendant on count 2 of case 28989-Crim to imprisonment for a period of three years and pay a fine in the sum of $500. It Is Ordered defendant stand committed pending payment of fine.

Attorney Barwick moves for stay of execution, and It Is Ordered said motion is denied.

Attorney Barwick moves for bond on appeal.

Counsel stipulate that it be deemed notice of appeal filed prior to motion for bond on appeal.

It Is Ordered that application for bond on appeal is denied.

The court states various reasons for denying application for bond on appeal, and orally certifies that appeal not taken in good faith.

It Is Ordered that defendant stand committed to the custody of the U. S. Marshal.

John A. Childress, Clerk, By William W. Luddy, Deputy.

[fol. 196]

IN UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

No. 28989-Criminal

UNITED STATES OF AMERICA

v.

CARLIN CONSTANTINE VENUS

JUDGMENT AND COMMITMENT—May 31, 1960

On this 31st day of May, 1960 came the attorney for the government and the defendant appeared in person and by counsel, Kenneth Barwick.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty of the offense of failure to keep Selective Service Board advised of the address where mail would reach him, in violation of the Universal Military Training and Service Act, 50 USC, App. Sec. 462 (a), as charged in count 2 of the Indictment in two counts, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years and pay a fine unto the United States in the sum of $500.00, on count 2.

It Is Adjudged that defendant stand committed pending the payment of the fine.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

James M. Carter, United States District Judge.

Filed May 31, 1960

John A. Childress, Clerk, By William W. Luddy, Deputy Clerk.

[fol. 197] [File endorsement omitted]

In United States District Court for the

Southern District of California

Southern Division

No. 28989-SD

United States of America, Plaintiff,

vs.

Carlin Constantine Venus, Defendant.

Notice of Appeal—Filed May 31, 1960

The appellant is Carlin Constantine Venus and he resides at 756 Pier Avenue, Apartment # 3, Santa Monica, California.

The attorneys for the appellant are Hayden C. Covington, Attorney at Law, 124 Columbia Heights, Brooklyn 1, New York, and Kenneth A. Barwick, Attorney at Law, 7918½ Broadway, Lemon Grove, California.

The appellant was charged with wilfully and knowingly violating a duty required by the Universal Military Training and Service Act.

The appellant was sentenced to confinement in a federal institution for a period of three years on the 31st day of May, 1960.

The appellant is at this time in the custody of the U. S. Marshal.

I, the above named appellant, hereby appeal to the United [fol. 198] States Court of Appeals for the Ninth Circuit from the above stated judgment.

Dated this 31st day of May, 1960.

Carlin Constantine Venus, Appellant.

Received copy 5/31/69, Robt. D. Hornbaker, Asst. U. S. Attorney.

[fol. 1]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

Honorable James M. Carter, Judge Presiding

No. 26877—Criminal
and
No. 28989—Criminal

UNITED STATES OF AMERICA, Plaintiff,

vs.

CARLIN CONSTANTINE VENUS, Defendant.

Reporter's Transcript of Proceedings

APPEARANCES:

For the Plaintiff: Robert Hornbaker, Esq.

For the Defendant: Hayden C. Covington, Esq.
Kenneth A. Barwick, Esq.

[fol. 3]

San Diego, California, Thursday, May 5, 1960, 9:30 A.M.

(The following proceedings were had in chambers, defendant being present together with his counsel.)

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[fol. 13] (The following proceedings were had in open Court, defendant present together with his Counsel.)

Mr. Hornbaker: The Government is ready your Honor.

Motion to Withdraw Plea and to File an Amended Motion for Dismissal

Mr. Covington: If it please the Court, we are ready.

We have a request that the Court permit us to withdraw our plea in the case and order filed an amended motion for dismissal setting up certain facts that have transpired and have come to our knowledge since the ruling on the first motion for dismissal showing prejudice.

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[fol. 14] (Whereupon the following proceedings were had in chambers. The defendant present in person, and both sides represented by Counsel.)

The Court: I didn't get the first part of your motion. You asked leave, Mr. Covington, to withdraw the plea and file this motion to dismiss, which is an amended motion amending the original motion. It is identical in every respect except for the material that appears beginning at Line 27 in the middle of Page 4 down to Line 18 on Page 6, and then that relates to the speedy trial provision of the Constitution.

Ground 2 on Page 6 is new. That is a formal attack against the Regulation that is made the basis of one of the counts.

Ground 3 on Page 7 is new, but that is a formal attack against the Constitutionality of another Regulation.

Ground 4 on Page 7 is another ground, but it is an attack against the Constitutionality of the Regulation on which the indictment is based,

You asked to withdraw your plea of Not Guilty and—

Mr. Covington: And filed this.

The Court: For the reason that ordinarily such motions must be made before plea.

[fol. 15] Mr. Covington: That is right, your Honor, unless there would be a Waiver of that that would preserve the rights of the defendant in the event the Court should allow it to be filed.

We ask leave of the Court to file the motion, too. It wouldn't prejudice the rights of the Government, and it is in the discretion of the Court to allow us to do this, because

we feel that at the time the original motion was made in haste the indictment was returned and we did not have knowledge of the fact that the F.B.I. Agent who interviewed the defendant in April, 1955 and who advised him of an outstanding Order had died, and also we didn't know at that time that he was present at all times during the last trial and that Mr. Hornbaker had him here but didn't put him on the stand and he sat in the Courtroom and heard all the evidence, according to information and belief we have.

The Court: What is the Government's position on this?

Mr. Hornbaker: I have no objection to their withdrawing the plea for the purpose of making the motion.

The Court: I am talking about procedurally. Is that the way you would prefer to have it done?

Mr. Hornbaker: Could we stipulate that the motion could be filed and considered without the necessity of withdrawing the plea and that it will not be considered as a Waiver? It would save the necessity of going through that formality [fol. 16] on the record.

The Court: Is that satisfactory?

Mr. Covington: I have no objection to proceeding in either manner.

Mr. Hornbaker: I would prefer to do it in the latter manner, if that is all right.

The Court: I think that is proper. Very often we provide that at the time the plea is entered motions may thereafter be made. There is no magic in these procedures. If it is stipulated that no objection or contention will be made in connection with allowing the motion to be now made and heard notwithstanding the fact that the plea has already been entered, it is agreeable with me.

Mr. Hornbaker: It certainly is all right with us.

The Court: Is it agreeable with you?

Mr. Covington: I have no objection.

ALLOWANCE OF MOTION TO BE FILED

The Court: All right, the motion will be filed. I don't intend to hear you at length on it.

Mr. Covington: We don't particularly care to argue the matter at length. The gist of the matter has heretofore

been considered by the Court. The only thing we neglected to show was this prejudice by reason of the lack of the availability of the F.B.I. officer's testimony and possibly dimming memory of the collaborating witnesses.

[fol. 17] The Court: I had looked up the law in this speedy trial you made the motion for, and I am confident that the law is clear that "speedy trial" talks of a trial of an indictment after its return. It has nothing to do with when an indictment is returned. I don't know of any law, and I don't know that you have cited any, that says that the Government must return an indictment within a certain time within the statute of limitations.

Mr. Covington: That is correct.

The Court: That part of the motion is again denied.

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[fol. 39] (Whereupon, proceedings were resumed in open Court as follows:)

• • • • • • •

[fol. 40] INDICTMENTS

The Court: The first indictment is No. 26877 and reads as follows:

"The Grand Jury charges defendant CARLIN CONSTANTINE VENUS, a male person within the class made subject to Selective Service under the Universal Military Training and Service Act, registered as required by said Act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 140, said Board being then and there duly credited and acting, under the Selective Service System established by said Act, in San Diego County, California, in the Southern Division of the Southern District of California; pursuant to said Act and the regulations promulgated thereunder, the defendant was classified in classification 1-A and was notified of said classification and notice and order by said Board was duly given to him to report for induction into the armed forces of the United States of America on November 8, 1955 in San Diego County, California, in the division and district aforesaid: and the said time and place the defendant did knowingly fail and neglect to perform a duty required of him

[fol. 41] under said act and the regulations promulgated thereunder in that he then and there knowingly failed and neglected to report for induction into the armed forces of the United States as so notified and ordered to do."

The second indictment is No. 28989 and is in two counts and reads as follows:

"The Grand Jury charges:

COUNT ONE

Defendant CARLIN CONSTANTINE VENUS, a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said Act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 140, said Board being then and there duly created and acting under the Selective Service System established by said Act in San Diego County, California, in the Southern Division of the Southern District of California; that pursuant to said Act and the regulations promulgated thereunder, the defendant CARLIN CONSTANTINE VENUS was classified 1-A and was notified of said classification; that thereafter a notice and order by said Board was duly given to the defendant CARLIN CONSTANTINE VENUS to report for induction into the Armed Forces of the United States of America on November 8, 1955, in San Diego County, Calif., in the division and district aforesaid; that at said time and [fol. 42] place, the defendant CARLIN CONSTANTINE VENUS failed and neglected to report for induction; that defendant CARLIN CONSTANTINE VENUS thereafter had a continuing duty from day to day under said Act and the regulations promulgated thereunder to report to said Board for induction into the Armed Forces of the United States; that on or about April 9, 1956, the defendant CARLIN CONSTANTINE VENUS, in the division and district aforesaid, knowingly failed and neglected to perform said continuing duty required of him under said Act and the regulations promulgated thereunder, in that he knowingly failed and neglected to report to said Board for induction into the Armed Forces of the United States.

COUNT TWO

Defendant CARLIN CONSTANTINE VENUS, A male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said Act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 140, said Board being then and there duly created and acting under the Selective Service System established by said Act in San Diego County, California, in the Southern Division of the Southern District of California; that pursuant to said Act and the regulations promulgated thereunder the defendant CARLIN CONSTANTINE VENUS thereafter had a duty to keep said Board advised at all times [fol. 43] of the address where mail would reach him; that on or about February 1, 1955, in the division and district aforesaid, the defendant CARLIN CONSTANTINE VENUS knowingly failed and neglected to perform said duty required of him under said Act and the regulations promulgated thereunder in that he knowingly failed and neglected to keep said Board advised of the address where mail would reach said defendant."

[fol. 44] Now, the gist of the three counts, the first count alleges that the defendant knowingly failed to perform a duty in that he did knowingly fail to report for induction on November 8, 1955.

The first count of the second indictment alleges the same facts, but charges that he thereafter had a continuing duty, day by day, to report, and that on or about April 9 1956 he neglected and failed in a duty in that he failed to report for induction.

The third count, in substance, alleges that about February 1, 1955 knowingly failed and neglected to perform a duty to keep the Board advised of any address where mail would reach him.

* * * * * * *

[fol. 98] COLLOQUY

The Court: Are you talking about a date after April 9, 1956?

Mr. Covington: Yes, your Honor.

The Court: I am not going to permit any evidence after April 9, 1956.

Mr. Covington: That is in the file as well.

The Court: It may be in the file, and if it is error it is error; but I am not going to permit testimony of what happened after April 9, 1956.

Mr. Covington: This is a surprise ruling to us.

The Court: Mr. Barwick, counsel in this case, was advised.

Mr. Barwick: We discussed that, but we said it would be admissible for a limited purpose only to show intent, but not to prove anything else.

The Court: That is not my understanding. A man is accused of having committed a crime on a certain date. What he does thereafter is subject to the contention that it is self-serving. It is a general rule of law that what transpires [fol. 99] after the date on which a crime is alleged to have been committed—I am not saying whether one was or was not—it can't be received in evidence.

* * * * * * *

[fol. 104] Helen A. Haisch, called as a witness for the Government, being first duly sworn, on her oath was examined and testified as follows:

The Clerk: State your name please.

The Witness: Helen A. Haisch.

Direct examination.

[fol. 105] By Mr. Hornbaker:

Q. Mrs. Haisch, what is your occupation?

A. I am Clerk of Local Board 140 for the Selective Service System.

Q. And how long have you held that position?

A. I have been Clerk of Local Board 140 since 1951.

Q. Would you state what your duties are as Clerk of Local Board 140.

A. Well, I have complete charge of all the files of that Local Board. My responsibility is to open and stamp all of the incoming mail, take care of all the mail I can myself,

answer all inquiries, and those that require Board action I see that these files are placed before the Board. At the Board Meetings I prepare and mail the classification cards or the SS Form 110 to the Registrants, advising them of their new classification. I prepare and mail Orders for physical Examination and Orders for Induction.

Q. And you keep the file on each of the Registrants with Local Board 140?

A. Yes sir, I do.

The Court: Where is Local Board 140 located?

The Witness: At 1215 Seventh Avenue in the Fox Theatre Building, San Diego.

The Court: Is there more than one Local Board here in San Diego?

[fol. 106] The Witness: Yes sir; there are 6 Local Boards in our group. They begin with Local Board 138 through 143.

By Mr. Hornbaker:

Q. Have you kept the file in Local Board 140 for Mr. Carlin Constantine Venus?

A. Yes, I have.

• • • • • • •

[fol. 110] The Court: What I am suggesting is that we use the original file as to that part that is Government's Exhibit 1, and we will use the photostats you have already marked in certain segregated groups, we will have to give them different numbers than the general 1-A that the Government has given them for the part that was separated, and then if there is a specific offer of or an objection to any of the parts that have been taken out they can be ruled on one by one. They are in sorted groups for that very purpose. So instead of having a blanket offer or a blanket objection, let's find out specifically what materiality there [fol. 111] is in these documents.

Mr. Covington: We can take each of those papers appearing in Exhibit 1-A and make a separate offer.

• • • • • • •

The Court: The Jury present in their proper places with the alternate. The defendant present with counsel.

Mr. Clerk, hand back what you now have marked as 1-A to Mr. Hornbaker and let's have the photostats marked 1-A through E or F.

A series of photostats heretofore marked for identification on January 21, 1960 as 1-A through 1-J for identification will be now marked 1-A through 1-J for identification as of today.

You no longer have a 1-A except these photostats.

I propose to hear your objections to the admission of what is now Government's Exhibit 1 and then hear you [fol. 112] individually on the photostats 1-A to 1-J.

Do you offer Government's Exhibit 1, the Selective Service file, minus certain parts?

OFFERS IN EVIDENCE

Mr. Hornbaker: Yes, your Honor, I offer Government's Exhibit 1-A in its entirety.

The Court: Government's Exhibit 1.

Mr. Hornbaker: I offer Government's Exhibit 1, which is a part of the Selective Service file.

Mr. Covington: I renew my objection that I made, that the entire file should go in evidence.

The Court: Overruled. You may be heard on the individual parts.

Mr. Covington: As they are offered.

The Court: Government's Exhibit 1 will be received in evidence.

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[fol. 116] The Court: Exhibit 1-H will be received in evidence, so that it and Government's Exhibit 1 now constitute the file before the Jury.

Come forward, Mrs. Haisch.

Mr. Hornbaker: Before the witness resumes the stand, I would like to have one additional document marked Government's Exhibit 1-M for identification, your Honor.

The Court: Exhibit 1-M.

Mr. Covington: There is no objection to that, your Honor.

The Court: Registration Card.

Mr. Hornbaker: Yes. Your Honor, I offer Government's Exhibit 1-M in evidence.

The Court: It will be received in evidence.

[fol. 117] You may proceed.

(The witness Helen A. Haisch resumes the Witness Stand.)

Direct examination resumed.

By Mr. Hornbaker:

Q. Did you mail the notice of 1-A classification to the defendant on September 2, 1955, Mrs. Haisch?

A. Yes, sir.

Q. Did you make an entry in the Selective Service file?

Mr. Covington: You got away from me there. September 2, 1955, is that the classification that is involved here?

Mr. Hornbaker: I believe it is, yes.

Mr. Covington: O.K.

By Mr. Hornbaker:

Q. Did you make an entry in the Selective Service file of the mailing of that 1-A classification?

A. Yes I did.

Q. And where did you make that entry?

A. In the minutes of action on the back of the classification questionnaire.

The Court: I show you a document out of Government's Exhibit 1 which is called "Selective Service System Classification Questionnaire," and on the back of it is a series of sheets showing the various actions by the Board. Is this where you keep the minutes of action?

The Witness: Yes sir.

[fol. 118] The Court: And then running down to the date September 2, 1955 there has been stamped in "Form 110 mailed."

The Witness: Yes sir, and that is the classification card.

The Court: Form 110 is a classification card or notice of classification?

The Witness: Yes.

The Court: What was that classification?

The Witness: 1-A. That was the classification given him by the Board on the day before at the Board Meeting.

The Court: As shown here on the minutes?

The Witness: Yes sir, as shown here on the minutes.

The Court: 1-A means what?

The Witness: That he is available for service, if found acceptable by the Armed Forces.

The Court: Go ahead Mr. Hornbaker.

By Mr. Hornbaker:

Q. To what address was the 1-A Notice of Classification sent?

A. It was sent to the Modesto address.

Q. What was that address?

A. If I remember correctly it was 1431 Tenth Street, Modesto.

Q. Did the Notice of Classification have a return address on it.

A. Yes sir.

[fol. 119] Q. Where was that return address?

A. It was to Local Board 140, 1215 Seventh Avenue, Room 205, Fox Theatre Building, San Diego 1, California. Of course, that is headed by "Selective Service System".

Q. Was that 1-A Classification Card ever returned to Local Board 140?

A. No sir.

Q. Mrs. Haisch, I ask you to look through Government's Exhibit 1 and find the Order to Report for Induction on October 28 or the Order to Report for Induction dated October 28, 1955, and I believe you will find that at Page 168 at the bottom of it.

A. Yes, I have it.

Q. Is that an original or a carbon copy?

A. This is the carbon copy.

Q. Did you prepare the Order?

A. Yes sir.

Q. Did you prepare any other carbons?

A. No, just this one.

Q. When did you prepare the original and carbon copy of that Order to Report for Induction?

A. On October 28, 1955.

Q. What did you do with the original copy of the Order to Report?

A. The original was folded and placed in the envelope [fol. 120] which had been addressed to Mr. Venus.

Q. Did anybody sign that original Order to Report before it was placed in the envelope?

A. Yes sir.

Q. And who signed it?

A. Mr. Joseph Levikow.

Q. Who is Mr. Joseph Levikow?

A. A member of Local Board 140.

Q. Was there an address on the envelope in which you placed the original of that Order to Report for Induction?

A. Yes sir.

Q. What was that address?

A. 1431 Tenth Street, Modesto, California.

Q. Was that the last address which you had received from the defendant Mr. Venus?

A. Yes sir, it was.

The Court: This envelope then had his full name?

The Witness: Yes sir.

The Court: And the address 1431 Tenth Street, Modesto?

The Witness: Yes sir, that is correct.

The Court: Did it have a return address in the corner?

The Witness: Yes sir, in the corner of the envelope "Selective Service System, Official Business," and then in the block on the envelope is the Local Board Stamp "Local Board 140, Fox Theatre Building, Room 205, 1215 Seventh [fol. 121] Ave., San Diego 1, California."

By Mr. Hornbaker:

Q. How had you received the last change of address from Mr. Venus?

A. It was Registered Mail, if I remember correctly. Is that what you mean, or—

Q. Would you examine Government's Exhibit 1 and find the communication, if there is one, of the last address of

Mr. Venus? And I suggest that you look at the document which has 145 at the bottom.

A. Yes sir, I have that.

Q. What is that document?

A. It is a letter from Mr. Venus addressed to Local Board 140.

Q. What is the date of that letter?

A. June 7, 1954.

Q. Was that the last change of address you had received from Mr. Venus before mailing the Order to Report for Induction dated October 28, 1955?

A. Yes sir.

The Court: Let me see it.

The Witness: Yes sir.

The Court: It was also the last letter you had received from Mr. Venus, was it, before you mailed him this Classification 1-A on September 2, 1955?

[fol. 122] The Witness: Yes sir.

The Court: Did you make a note of these last addresses on your cover sheet?

The Witness: Yes sir, we do, on the front of the cover sheet.

The Court: And by the front of the cover sheet you mean the front of the folder?

The Witness: The folder or file, yes sir.

The Court: Is that Item 6 on the front there, 1431 Tenth Street, Modesto, California 6-7-54?

The Witness: Yes sir, and that is the date received.

The Court: The Jury may later inspect this document. By the "cover sheet" she refers to a part of the folder.

Go ahead.

By Mr. Hornbaker:

Q. Did you receive any change of address from Mr. Venus between June 7, 1954 and the end of 1955?

A. No sir.

Q. Did you place any postage on the envelope in which you placed the Order to Report for Induction?

A. No, we have a Government Franked Envelope that we use.

Q. And will you state what the Franked Envelope is?

A. Well, it is Postage Paid, no Postage necessary, Postage Paid by the Government—that is, by Selective Service.

[fol. 123] Q. What did you do with the envelope containing the original Order to Report for Induction?

A. I placed it in the outgoing Mail Box in our office.

Q. Did you make any entry in the minutes of the Board action at the time you placed the envelope in the office Mail Box?

A. Yes sir.

Q. And would you examine Government's Exhibit 1 and state where you made that entry?

A. The entry was made on the back of the Classification Questionnaire, "minutes of action," and it was dated October 28, 1955, "SS Form 252 mailed," and the 252 is an Order to Report for Induction.

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[fol. 124] By Mr. Hornbaker:

Q. Mrs. Haisch, how many of these office Mail Boxes did you have in Local Board 140?

A. We have two receptacles for the mail; one for the local mail, San Diego mail, and the other for out-of-town mail.

Q. And who used those Mail Boxes?

A. The entire office. All of the Boards in the office had these same Mail Boxes.

Q. Would you state the numbers of those Boards?

A. Yes sir; 138, 139, 140, 141, 142 and 143—six Draft Boards.

The Court: In other words, all six Draft Boards in San [fol. 125] Diego were there in one building?

The Witness: Yes, we have one Local Board group office. All the Boards are located in the same office.

By Mr. Hornbaker:

Q. Is there any name that is applied to the Local Boards 138 through 143 collectively?

A. San Diego Local Board Group.

Q. Did you have an invariable custom—

Mr. Barwick: I object to that question as assuming facts not in evidence and calling for a conclusion of the witness, your Honor.

The Court: Sustained.

Ask your question, what her custom was.

Mr. Hornbaker: What was your Honor's ruling?

The Court: I sustained the objection. Ask her what the custom was. Let her testify.

What was your custom at the Local Board Office with reference to outgoing mail? How would you handle it?

The Witness: It was our custom to place our letters in these two boxes or mail receptacles and then at the close of the day they were gathered and posted in the United States Mail Box.

The Court: Who gathered them?

The Witness: One of the Clerks in the office.

The Court: Would take them out of this receptacle?

[fol. 126] The Witness: Yes sir.

The Court: And carry them over and put them in the Mail Box?

The Witness: We took them out as requested by the Post Office, we either put rubber bands around them in small groups or something that the Post Office furnished us to bind them together so that they would stay together and then we would take them and place them in the United States Mail Box.

The Court: How far away was this Mail Box?

The Witness: Just on the corner from our building.

The Court: This would be done at the end of the day?

The Witness: Yes sir, this would be done at the end of each day.

The Court: And in one receptacle would be all the outgoing mail to local Registrants who lived here in San Diego?

The Witness: Yes sir, that is right.

The Court: And the other box would be the mail to Registrants who had addresses out-of-town?

The Witness: Yes, sir, that is correct.

The Court: Was there any variation in this custom?

The Witness: No sir. That was our invariable custom.

The Court: How long had that been the practice?

The Witness: Since I have been employed by the Selective Service, and that is about 12 years.

The Court: So as soon as a letter was addressed and [fol. 127] prepared you didn't run out and stick it in the Mail Box?

The Witness: No, we placed it in this box and at the close of the day we placed it in the Mail Box.

By Mr. Hornbaker:

Q. Was there any person or persons who usually took the mail in the office mail box and deposited it in the United States Mail Box at the end of each day?

A. Yes sir, at that particular time, Mrs. Huckaby and I usually took it.

Q. At what particular time?

A. At the particular time we are speaking of in October, 1955.

Q. Do you remember preparing this specific Order to Report for Induction?

A. Yes I do.

Q. Would you tell us how you remember preparing this particular Order?

A. I remember this because I remember Mr. Venus. He had appeared at the Local Board office for personal appearances and he had been in to talk with us on different occasions, and he had refused to report for induction at one other time. So I did remember preparing this Order. And may I say that I also remember him because he was runner-up for Mr. America.

Q. Did you have any established procedure in 1955 for handling mail that was returned to the Local Board?

[fol. 128] A. Yes sir.

Q. Would you state what that procedure was?

A. All mail returned to Local Board was stamped and placed in the Registrants folder. By stamping I mean the date stamp was placed on the envelope and the letter, whatever the information was that had been returned, and was placed in the Registrant's folder, and we tried then through the references he had given us to locate the Registrant.

The Court: By the references do you refer to the address he gave you or to the people he may have listed in the file?

The Witness: To other persons he may have listed, yes sir, the parents or whomever they listed as the person who would always know their address.

By Mr. Hornbaker:

Q. Was the Order to Report for Induction ever returned to the Local Board?

A. No sir.

The Court: You are referring to the Order that she said she prepared and mailed on October 28, 1955?

Mr. Hornbaker: Yes, your Honor.

The Witness: No sir, it was not returned.

By Mr. Hornbaker:

Q. Did you mail any Orders to Report for Induction to any other Registrants on October 28, 1955?

A. Yes sir, I did.

[fol. 129] Q. And how many did you mail?

A. Twenty-four.

Q. Do you know whether or not those twenty-four Registrants reported for induction?

Mr. Barwick: That is objected to as being immaterial, your Honor.

Mr. Hornbaker: I think it tends to show—

The Court: Sustained as to the form of the question whether he reported for induction.

Were any of those twenty-four other envelopes mailed the same day returned?

The Witness: No sir, they were not.

By Mr. Hornbaker:

Q. Were they placed in the same office mail box as Mr. Venus's?

A. Yes sir, they were.

Q. Do you get a notice from the Induction Center when a man reports for induction?

A. Yes sir, we do.

Q. Did you get any such notice from any of the twenty-four Registrants whose Orders were mailed on October 28, 1955?

A. Yes, we did.

Q. How many notices did you get?

A. Of the men who reported for induction and were inducted, as I recall, there must have been about eighteen who [fol. 130] reported to the Induction Station.

Q. Did you receive any correspondence indicating what disposition was made of the remaining six?

Mr. Barwick: I object to that as being immaterial, your Honor.

The Court: Overruled.

The Witness: Yes.

Mr. Barwick: I object to that on the further ground that the best evidence of the disposition would be in the Draft Board files of those Registrants.

The Court: If she knows of her own knowledge, she may testify.

The Witness: I know that we had all—either 4 men whose inductions were postponed—I know that all who were supposed to report on that date, according to my delivery list, reported or were accounted for. Some of the Registrants inductions were postponed by the Local Board. Two of the Registrants had enlisted and we had the notification from the Armed Forces of their enlistment.

By Mr. Hornbaker:

Q. Did you ever receive a notice that Mr. Venus had gone into the Military Service in November, 1955 or at any later date?

A. No sir.

Q. I have no further questions.

[fol. 131] Cross examination.

By Mr. Covington:

Q. Mrs. Haisch, you have before you, do you not, the Government's Exhibit 1? That is the file that has been received in evidence, is that correct?

A. Yes sir.

Q. Do you have it before you there now in the Witness Box?

A. Yes, I have.

The Court: Do I have a copy of this file somewhere?

Mr. Covington: I don't know, your Honor.

Mr. Barwick: It is at the end of the counsel table there.

Mr. Covington: This is one of the photostats that were furnished to us before, but it is not complete.

By Mr. Covington:

Q. Mrs. Haisch, you referred in your examination to the term "cover sheet."

A. Yes sir.

Q. Explain to the Jury what you mean by that and what that is.

A. I believe in some instances some call it a jacket or as the Judge referred to it the folder. However, it has always been our custom to call them cover sheets.

Q. That is a common term that is used by all the Selective Service System, is it not—cover sheet?

[fol. 132] A. Yes sir, it is. It is a manila folder in which we place all information concerning the Registrant.

Q. Will you please tell me how many cover sheets there are for that file.

A. Let's see, there are three.

Q. Three?

A. Yes.

Q. Would you explain to us why there are three on this file? Is it because the former two had worn out and had become dog-eared and couldn't be used?

A. Yes sir.

Q. That is the reason that you have the three; is that right?

A. Yes sir, that is right.

Q. Do you have any way of telling us when it was that the last cover sheet was made because of the dog-eared condition of the other two, approximately? Just look at the last one, the one that is on the outside.

A. Yes, I know which one you mean, but I don't know that I have any way of telling when it was made.

Q. Was it prepared a year ago?

A. I couldn't say sir.

Q. Was it prepared two years ago?

Mr. Hornbaker: I object to that as already having been asked and answered, your Honor.

[fol. 133] The Court: What is the materiality?

Mr. Covington: I will establish the relevancy of it, your Honor. I will come back to it later.

By Mr. Covington:

Q. What cover sheet did you use when you prepared the address for the envelope that you put in the mail box in the office containing the Order to Report for Induction?

A. I don't recall if I used the one on the outside or the next one.

Mr. Covington: May I approach the Witness Box, because we don't have a copy of this, your Honor.

Q. Number 6 is typed on there, 1431 Tenth Street, Modesto, California, 6-7-54; is that not correct?

A. Yes sir, that is right.

Q. Now, you have April 13 here, the date of the classification 1954 typed on there, and you have September 1, 1955 typed on there with 1-A opposite each, one the Appeal Board and 1-A continued by the Local Board September 1, 1955, and you have a third asterisk there. What does that third asterisk stand for?

A. That means it is for our own purpose, for our own use.

Q. Talk louder please.

A. It means he has been found acceptable, he is an acceptable man, he has been found acceptable by the Armed Forces.

[fol. 134] Q. Apparently the last time that any entry was made on the second cover sheet, the second dog-eared one, is 4-13-54; is that correct?

A. Yes sir, that is right.

Q. So that if that is the entry, 4-13-54, then the September 1, 1955, sometime between April, 1954 and Sep-

tember 1, 1955 this last cover sheet was made? Is that correct?

A. I presume so, sir.

Q. Who prepared the last cover sheet, please ma'am?

A. I did.

Q. And you have no way of telling when that was prepared; is that correct?

A. No sir, I really don't.

Q. Is it not true that when you prepared the Order to Report for Induction that you have testified about being put in the mail box you used this last cover sheet because the Order was prepared after September 1, 1955, was it not?

A. Yes sir.

Q. So when you prepared the Order to Report for Induction in October, 1955 you did not use either the first dog-eared or the second dog-eared cover sheet, did you, ma'am?

A. I'm sorry, I couldn't say, sir.

The Court: Let's see it.

Go ahead.

By Mr. Covington:

[fol. 135] Q. You have told us that you prepared the last cover sheet some time after April, 1954 and before September, 1955; is that not correct? Was that not your testimony just a few minutes ago?

A. I said, it appeared so, yes sir; but I really couldn't say when I prepared it.

Q. I am not asking you for the exact date. But since the entry of September 1, 1955 appears on the outside cover sheet and does not appear on the second cover sheet, we would take it that the outside cover sheet was in existence and being used in September, 1955; is that correct?

A. I really can't say.

The Court: She says she doesn't know.

Mr. Covington: I would like to show it to her again, your Honor.

The Court: You may show it to her again, but you have asked her twice already and she says she doesn't know. Go

on to something else. The Jury may inspect it. Apparently when one got worn another was typed up.

Let me ask you this question. I notice that apparently changes of addresses were put in with ink.

The Witness: Yes sir.

The Court: And one of these cover sheets shows a series of these addresses typed.

The Witness: Yes sir.

[fol. 136] The Court: That was a sheet where you typed up everything that appeared before?

The Witness: Yes.

The Court: Then you put new ones on with ink?

The Witness: Yes, I believe so.

Mr. Covington: That is exactly what I am trying to get at.

The Court: She says she doesn't know, Mr. Covington. Go on to something else.

The Witness: According to this, it would seem that I had typed this up sometime after 11-15-56.

By Mr. Covington:

Q. There is the one here, the last change of address on the second one is number 6, 6-7-54.

A. Yes sir.

Q. And the last change on the first one shows on there 6-7-54 and written in there later April 10, 1956.

A. Yes.

Q. The Pier Street address.

A. Yes. May I look at this just a moment?

Q. Yes.

A. I really believe Mr. Covington, that these cover sheets—this is the original, this is the second cover sheet, and this is the third one, and this one is the original.

Q. I wonder if you can mark them now that you have [fol. 137] arranged them in some manner there and initial them?

A. Yes sir. This is the original cover sheet.

Q. The Judge is handing you a pencil now.

A. Thank you sir. Would it be all right to put just one?

Q. One, and put your initials there.

A. All right.

Q. And would you put a circle around the one with your initials?

A. Yes. This is one. This is the original. And then this is the duplicate.

Q. You are identifying another dog-eared cover sheet, which is the second one?

A. Yes.

The Court: Make it 2 and put your initials.

Mr. Covington: And circle that.

By Mr. Covington:

Q. And then mark the third one.

A. And then 3, all right.

Q. Now, since you have identified them in this manner, would it refresh your memory any to say when it was that the number 2 cover sheet was discontinued being used and number 3 begun?

A. As I was going to say to you a minute ago, I would say it was sometime between this date and this date; that [fol. 138] would be 11-15-56 and 2-6-58. That would be sometime in between there that this cover sheet—

Q. The last entry that appears on the second cover sheet is September 1, 1955; is that correct?

A. Yes sir.

The Court: The last entry?

Mr. Covington: On number 2.

The Court: In the box of "classification."

Mr. Covington: In the box of "classification."

The Court: That is also the last entry of addresses?

The Witness: No sir.

Mr. Covington: The last entry of addresses is 6-7-54, which is typed in, and the last one, number 7, is written in longhand, 4-10-56.

The Court: And then there are some additions.

Mr. Covington: Then there is one 4-10-56 clipped on there, which is identical to the one in number 7.

By Mr. Covington:

Q. So this one here continues, the card attached to it is nothing more than a repetition of what appears in Item No. 7; is that right?

A. I believe it is sir.

Q. Now, you may or may not have used this number 3 cover sheet in preparing the letter; isn't that correct?

A. I don't know. I doubt if I did use it, but I really [fol. 139] couldn't say.

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By Mr. Covington:

[fol. 140] Q. When you prepared number 2 and number 3 cover sheets, can you explain to the Jury and to Judge Carter why it was that you omitted the entry that appears opposite the address on number 1 where it shows "1431 Tenth Street, 6-7-54, Modesto, California (see letter inside)" in red? Why is it that when you prepared number 2 you did not opposite 6 here make an exact copy and say "(see letter inside)"? How come you to omit it?

A. I don't know. I put that "(see letter inside)" on there for my own. I don't know why I omitted it.

Q. But you did omit it; is that correct?

A. Yes sir; it is not on the second one.

Q. When you prepared the last one, number 3, did you omit it on number 3?

A. Yes sir.

Q. What does "(see letter inside)" refer to?

A. It refers to the letter dated June 7, 1954—if that is the date.

Q. What does the June 7, 1954 letter say, or what does it have in it that caused you to put that entry on the first cover sheet "(see letter inside)"?

A. It was an address from Mr. Venus. I don't recall the exact wording. May I refer to the letter?

Q. You may refer to it please.

The Court: Read it to the Jury.

[fol. 141] The Witness: Yes sir.

This is addressed to:

"June 7, 1954

Local Board 140,
Fox Theatre Building, Room 205,
1215 Seventh Avenue,
San Diego, California

Dear Ladies and Gentlemen:

At this time I wish to inform you of my departure from San Diego to Modesto, California, because of secular employment. The Federal Bureau of Investigation I have notified when in Los Angeles after induction procedures. My new address is (Same employer) 1431 Tenth Street, Modesto, Calif., but can be reached within one or two days, at my San Diego address.

Thanking all of you,

I remain respectfully,

/s/ CARLIN VENUS"

By Mr. Covington:

Q. Explain to the Jury, after having read that letter, why was it that you made that notation opposite that entry on the original cover sheet showing his Modesto address?

A. I made that entry for the simple reason that if any mail were returned to us from the Modesto address that I would look for or try and contact him through his San Diego address.

[fol. 142] Q. Is it not a fact that you made that entry on the outside of that original cover sheet so that it would indicate to you that he could be reached at his San Diego address; is that correct?

A. Yes sir, that is correct.

Q. You knew that he had always given his parents as the persons through whom he could be reached; isn't that correct?

Mr. Hornbaker: I object to that as asking for a conclusion of this witness, your Honor.

The Court: Overruled.

The Witness: Would you read it.

The Court: Read the question.

(The reporter read the pending question.)

The Witness: Yes, that is correct.

By Mr. Covington:

Q. And this address in that letter was his parents' address that he stated; is that correct?

A. Yes, I believe so. He said his parents' address; yes sir.

Q. And the notation on the outside had reference to his parents' address appearing in the June letter; is that correct?

A. To the mention of the parents' address; yes sir.

The Court: The parents' address did not appear in that letter?

The Witness: No sir, it did not.

• • • • • • •

[fol. 143] By Mr. Covington:

Q. Turning to 141, which is the letter of June 7, at the [fol. 144] end of that letter it says "but can be reached within one or two days at my San Diego address," meaning the parents' address which was on the outside of the envelope, which is the next thing attached to that letter.

A. Yes.

Q. It shows "650 Eleventh Street, San Diego," does it not?

A. Yes sir, it does. But I didn't know that that was his parents' address necessarily from that. I think he had furnished me that address previously.

Q. You testified at an earlier trial that you did know it was his parents' address.

A. He had furnished me that address previously as his parents'.

Q. Did you not testify at a previous trial that you did know that was the parents' address?

A. I believe that was the parents' address, yes sir.

Q. Did you ever attempt to locate Mr. Venus after the mailing of that Order to his parents' address?

A. No sir, I did not, because the Order was—
Q. Just a minute. That's all I asked.

The Court: You may explain your answer.
Mr. Covington: All right.
The Court: Go ahead.
The Witness: The reason I didn't try to locate him at his [fol. 145] parents' address was because the Order was not returned to the office. Therefore, we assumed that he received it.
The Court: In other words, if a Notice of any kind to the Registrant should come back it would be stamped and put into the Registrant's file. Then you would attempt to find some other address?
The Witness: That is right. Then we contact the references and try to locate them.
The Court: It is noon time. Do you want to come back at 1:30 and maybe we will quit a little early?
You will be excused until 1:30. Please remember the admonition of the Court heretofore given you.

(Noon Recess.)

[fol. 146] San Diego, California, Tuesday, May 6, 1960, 1:30 P.M.

The Court: The case on trial. The defendant present with his counsel. The Jury in their proper places.
Come forward, Mrs. Haisch.

(The witness Helen A. Haisch resumes the Witness Stand.)

The Court: Proceed.

Cross examination (resumed).

By Mr. Covington:

Q. Mrs. Haisch, this morning in response to the question put to you by the United States Attorney you told him that you sent out a certain number of Orders that day; is that correct?

A. Yes sir, that is right.

Q. How many was it?

A. Twenty-four.

Q. And when did you find that out?

A. Well, I reviewed the information just not too long ago.

Q. The reason I asked you, isn't it a matter of fact that on the former trial when I asked you this very question you said you didn't remember it?

A. I didn't remember it that time.

Q. You have the Order to Report for Induction there, do you not?

A. Yes sir.

Q. In Exhibit 1?

[fol. 147] A. Yes sir.

Q. Will you get that Order out and read it to the Jury, please, so that they will understand at least what the Order says?

A. Yes sir.

It is entitled "Order to Report for Induction." It has the Local Board Stamp on it, dated October 28, 1955.

"The President of the United States to Carlin Constantine Venus, Selective Service #41402957S, mailing address 1431 Tenth Street, Modesto, California.

"Greetings: Having submitted yourself to a Local Board composed of your neighbors for the purpose of determining your availability for service in the Armed Forces of the United States, you are hereby ordered to report to the Local Board named above at the Greyhound Bus Depot, Travellers Aid Desk, First and Broadway, San Diego, California, at 6:30 A.M., on the 8th day of November, 1955, for forwarding to an Induction station.

"If you have had previous military service, bring your service records with you. If you wear glasses, bring them with you.

"This Local Board will furnish transportation to the induction station where you will be examined, and, if accepted for service, you will then be inducted into a branch [fol. 147a] of the Armed Forces. If you are not accepted, return transportation will be provided.

"Persons reporting to the induction station in some instances are found to have developed disqualifying defects since being examined and may be rejected for these or other reasons. It is well to keep this in mind in arranging your affairs, to prevent any undue hardship if you are rejected at the induction station. If you are employed, you should advise your employer of this notice and of the possibility that you may not be accepted at the induction station. Your employer can then be prepared to replace you if you are accepted, or to continue your employment if you are rejected.

"Wilful failure to report promptly to this Local Board at the place specified above and at the hour and on the day named in this Order is a violation of the Universal Military Training and Service Act, as amended, and subjects the violator to fine and imprisonment. You must keep this form and bring it with you when you report to the Local Board. Bring with you sufficient clothing for three days.

"If you are so far removed from your own Local Board that reporting in compliance with this Order will be a serious hardship and you desire to report to a Local Board in the area in which you are now located, go immediately to that Local Board and make written request for transfer of your delivery for induction, taking this Order with you."

[fol. 147b] Q. He was not ordered to report at the Local Board, was it?

A. No sir.

Q. Why was that?

A. We order all the Registrants to report to the Greyhound Bus Depot or any other transportation we are using at the time.

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[fol. 148] By Mr. Covington:

Q. Did you ever communicate with him after that date?

A. No sir; not with another Order, no.

Q. Did you ever communicate with him in any respect?

A. Yes, I believe we did.

Q. In writing?

A. Yes sir.

Q. When was that?

[fol. 149] A. I don't recall the date.

Q. You have the file there, Exhibit 1, take a look at it and see if you can find it.

The Court: Let's see Exhibits A to I, Mr. Clerk.

The Witness: There is no other information in this file; no sir.

By Mr. Covington:

Q. There is no other information in that file?

A. No sir.

Q. Did you ever communicate with him before April 8, 1956?

A. I don't remember.

Q. Look at the file and see if you can find such communication?

A. There is nothing here that I can—

The Court: It would be in these other files, if it appeared.

Mr. Covington: Before April 8th, your Honor.

The Court: I thought you said after April 8th.

Mr. Covington: No, before April 8, 1956.

The Court: All right.

The Witness: There is nothing in this file.

By Mr. Covington:

Q. Then you did not communicate with him between the dates set in the Order to Report and April 8, 1956; is that right?

[fol. 150] A. I don't recall and I don't see anything in here.

Q. You say you did or did not?

A. I said I don't recall.

Q. Would you say you did?

The Court: She said she didn't recall, and nothing appears in the file.

By Mr. Covington:

Q. Can we take it, then, from your testimony, that you did not communicate with him?

A. No sir, because I said I don't recall whether I did or did not.

Q. If you had communicated with him in writing, would it not be in the file?

A. Yes sir, it would, a copy of the letter.

Q. See if you can find any communication between that date and April 8, 1956?

A. I said I don't see anything in here, from us to Mr. Venus. There is nothing in this file addressed to Mr. Venus from the Local Board.

Q. If there had been it would be in the file, would it not?

A. It would be in some part of the file; yes sir.

Q. It would be in Government's Exhibit 1, would it not?

The Court: Or the portions we removed therefrom.

Mr. Covington: We would like to have you look at the [fol. 151] portions—

The Court: I have just inspected the parts removed, Exhibits 1-A through 1-J, and no communication appears.

While you are at it, I found Exhibit 1-I, it was missing when we were marking them, you know.

Mr. Covington: Yes, your Honor.

The Court: Proceed.

By Mr. Covington:

Q. Did you ever, after that date of November 8th attempt to locate him through the address of his parents here in San Diego that was known to you and the Board?

A. No sir.

Q. And why not?

A. As I explained before, the Order was not returned to us. Therefore, we assumed he received it, so we did not contact anyone else or try to contact anyone else.

The Court: Is it your duty to go around and look up Registrants who do not respond to a Draft Call?

The Witness: No sir, it is not.

Mr. Covington: That is a matter of law, and we take exception to that.

The Witness: We do try to locate them, I may say, though, your Honor, if—

By Mr. Covington:

Q. Does not the Regulation require you to attempt to [fol. 152] locate a delinquent Registrant? Are you familiar with the Regulation 1642.41?

A. Yes sir, I believe I am.

Q. Does it not require you to try to locate a Registrant when you learn that he had not reported to the Board?

A. If we have sent some communication to a Registrant and he does not answer it or it is not returned to us, then we assume he receives it.

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[fol. 153] Q. You know that Regulation 1642.41 requires you to do certain steps before you report him as delinquent to the United States Attorney; is that correct?

Mr. Hornbaker: I object to the question as incorrectly incorporating the contents of Section 1642.41, your Honor.

The Court: I think you are wrong, Mr. Covington. I was the United States Attorney and I was never familiar in those days with that procedure. If a man was delinquent he was reported as delinquent.

Mr. Covington: I take exception to the remarks of the Court because they are contrary to 1642.41. I would like to [fol. 154] let the record show what it says. I will ask the witness to read it.

The Court: We will discuss the Section out of the presence of the Jury, and of course if it is properly to be considered by them as being one of the Regulations it goes in without argument. The only inquiry is whether it is proper and whether your interpretation of the law is proper. We'll postpone that to sometime when the Jury is absent and discuss it further.

Mr. Covington: Then I shall not be allowed at this time to interrogate any further about whether they followed the procedure of 1642.41?

The Court: She has already told you that they didn't do anything about it. What further inquiry can you make?

Mr. Covington: I will ask specifically—

The Court: I will not permit any more at this time. If you want to recall her at some later time after we have discussed it, you may do so.

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[fol. 162] By Mr. Covington:

Q. At the top of page 173, under 3 "efforts made to locate the delinquent," it says—will you read what it says there?

A. Yes sir: "Efforts made to locate the delinquent. The delinquent has been located October 28, 1955 at 1431 Tenth Street, Modesto, California."

Q. Just a moment. Did you locate him at Modesto on that date?

A. We assumed that he was located.

Q. Where did you get the information that he was located on October 28, 1955 at Modesto?

A. When an Order or when a letter is not returned to us we assume the Registrant receives it.

Q. So this was an assumption and not a fact; is that right?

A. Yes sir.

The Court: For the benefit of the Jury, this is a printed form supplied by the Selective Service to be filled out by these Boards after an Induction Notice has been mailed and a Registrant has not responded. You may look at it when the Exhibit goes to the Jury.

By Mr. Covington:

[fol. 163] Q. Read the next.

A. "The person who will always know the delinquent's address is John Venus, 184 National Ave., National City, Cal."

Q. John Venus is the father; is that not correct? You knew that, did you not?

A. Yes sir.

Q. You knew him at that time to be his father; is that correct?

A. Yes sir. And this person has not been contacted.

Q. Why did you not contact Mr. Venus's father?

A. I believe I answered that by saying that we assumed that we had contacted Mr. Venus, so we saw no reason to contact his father.

Q. Down there below it shows—read the next paragraph, "Delinquent's last known place of employment."

A. "Delinquent's last known place of employment or business is Venice Construction Company, Harold Morrisson, Jr., Modesto, California. His employer has not been contacted."

Q. And why did you not contact the employer?

A. For the same reason we didn't contact the father.

The Court: Ladies and gentlemen, this form which counsel has seen fit to cross-examine on is a Form entitled "Selective Service System Delinquent Registrant Report." It is addressed to the United States Attorney of the District in which the Draft Board is located. In this case it is addressed to the Honorable Laughlin E. Waters, [fol. 164] 600 Federal Building, Los Angeles. It has a series of forms and a place to be filled out.

"Identification of the defendant.

"2 Offenses.

"3 Efforts made to locate delinquent.

"4 Mailed directly to delinquent."

And then a blank "Is or is not returned by the Post Office," and that has been filled out "is not"—"mail directed to delinquent is not returned by Post Office."

"5 Remarks," which are left blank.

"6 Further information."

And signed by member or clerk of the Draft Board.

The bottom of the Form says "This form will be used in making reports to the United States Attorney of delinquents who have failed to report for induction. Other delinquents will be reported by letter. This Form will be made out in triplicate. The original and first copy of the Form shall be sent to the United States Attorney for the Judi-

cial District in which the Local Board is located. A copy of the form shall be filed in the cover sheet. SS Form 101 of Delinquent."

By Mr. Covington:

Q. What did you say was the reason you did not communicate with the father and state that you had not in this Delinquency Report?

The Court: I don't think that is material. I don't think [fol. 165] a Draft Board has any obligation to do that. I will instruct the Jury that it is not material.

Mr. Covington: I take exception, your Honor.

The Court: And proceed to something else.

Mr. Covington: I take exception to the remark because the Regulation 1641.42 does specifically so require.

The Court: That pertains to other matters. We are going to discuss that out of the presence of the Jury. If you show me I'm wrong, you may inquire.

Mr. Covington: I am taking exception to the ruling and the remarks and instruction of law made in the presence of the Jury.

By Mr. Covington:

Q. I call your attention to the testimony given at a former trial where you were asked the same question and gave this answer:

"It was the opinion of the Board since Mr. Venus had always been so prompt and careful about sending us his change of address that we had his correct address. Therefore, they saw no reason for me to go on and try to locate him in another place."

Did you not give that testimony?

A. Yes sir. That is right.

Q. Take the Classification Questionnaire, the Minutes and the other papers in the file, would you please take them [fol. 166] and tell this Jury and Judge Carter whether this file was out of the office of the Local Board for a period of nine months from November, 1954 to July 11, 1955, including February, 1955?

A. Yes, the file was sent to our State Headquarters for photostating in September, 1954. What was the first date you asked me?

Q. November, 1954 to July, 1955.

A. November, 1954.

The Court: Was this the time of the Department of Justice Hearing?

Mr. Covington: No, your Honor. This material here shows the file was not in possession of the Board during these months because the testimony will show that this man mailed his card to the Board in February, 1955 notifying them of the change of address, at which time the file was out of the possession of the Board.

The Court: What practice do you have when a file is requested to be sent to your National Headquarters or State Headquarters or back to the Justice Department or wherever it might go? Do you have a practice?

The Witness: Yes sir. We have a procedure which we must follow in regard to a file that is sent out of the office. We are required to make a duplicate or a dummy cover sheet for this Registrant, and it is placed in the place where the original would be if it were in the office, and [fol. 167] this is kept until the original is returned. All the information or all letters coming in regarding this Registrant while the original is out of the office is placed in the dummy or duplicate cover sheet.

The Court: Let's get an answer to counsel's question. Was this file out of the office for a certain period of time?

The Witness: Yes. He said November, 1954 to July, 1955. Yes. It was out of the office during that time, yes sir.

By Mr. Covington:

Q. I would like to have you repeat to the Jury what you just told them in answer to Judge Carter's question in which you said that the dummy file was put back in the very precise place where the original file was.

A. Yes, it is put in the place where the original would be, I said.

Q. But where the original had been taken from; is that not correct?

A. We usually place it there or in our pending file, whichever the case might be.

Q. Which is it?

A. It depends. If there is information we are waiting on we place it in pending. If not, we place the dummy back where the original was.

Q. What happened on this occasion?

A. This one was probably placed in pending, but I don't [fol. 168] remember just exactly.

Q. You just got through testifying that it was placed not in the Pending separate file.

A. Maybe the original had been in the Pending. You didn't ask me where the original was.

The Court: She said one or the other.

By Mr. Covington:

Q. The first testimony, as I recollect, was that the file had been placed back in the same spot where the original had been taken from.

The Court: Ask your question.

By Mr. Covington:

Q. Did you not testify at the former trial that this file was taken out of the cabinet where all the files were and put in a separate file—the dummy?

A. I don't recall saying it, sir. Maybe I did. I can't remember.

Q. Don't you remember the facts?

A. Yes sir. I know that the dummy is always placed where the original would be or wherever the appropriate place for it to be is. If it is Pending, we place it in Pending. If there is information pending, we put it in what we call our Pending or our Suspense file.

Mr. Hornbaker: I would like to request at this time that when counsel is referring to prior testimony that he [fol. 169] give the page and line number of that testimony

so that we can be sure his question in Court correctly incorporates the prior testimony.

Mr. Covington: I'll try to do that.

The Court: Is it common practice in the Draft Boards for files to be necessarily sent to State Headquarters or other Headquarters?

The Witness: Yes sir, quite often we are requested to send a file to State Headquarters or some other part of the Selective Service System—the Southern area Headquarters in Los Angeles or the State.

The Court: You talk about a "Pending file" or a "Suspense file."

The Witness: Yes sir.

The Court: And then you talk about the other files in the regular place. How many Draft files in 1955 and 1956 would you have had in the regular filing places, approximately?

The Witness: Approximately how many registrations did I have at that time?

The Court: Roughly.

The Witness: I think it was around 13,000, sir.

The Court: And how big a file would be this Pending or Suspense file?

The Witness: It is the top drawers of the regular filing cabinet we keep our Pending files in.

The Court: What type of files do you then put in the [fol. 170] Suspense or Pending file?

The Witness: A file we are waiting information on. Say we have written a Registrant in regard to something and then we place the file in Pending. Or often times when we send it out we place it in Pending. At other times we put the dummy back where the original should be.

The Court: In other words, then, as I get it, this Pending or Suspense file is only a matter of convenience to have those files handy rather than to file them back with 13,000 other files?

The Witness: Yes sir, that is correct.

By Mr. Covington:

Q. Is the Suspense file different from the original file?

A. What do you mean sir?

The Court: Are you talking about the filing cabinet?

Mr. Covington: I am talking about the term she used. She said she had it in the "Suspense file," as I understand.

The Witness: Pending or Suspense. Some, the term is "Suspense; in others it is Pending."

By Mr. Covington:

Q. What is "Pending" and what is "Suspense"? I don't know and I would like to have an understanding. I suppose the Jury would, too.

The Court: I thought the witness just got through stating what type of files were put in the Suspense and Pending files.

[fol. 171] By Mr. Covington:

Q. Do you have a separate file called "Suspense file"?

A. Yes sir, I do.

Q. And do you have a separate file called "Pending file"?

A. No, that is the same, Pending or Suspense, whichever one prefers to call it.

Q. Is there a Suspense file for each Registrant?

A. No.

Q. Or is it for all Registrants?

A. It is a drawer of a filing cabinet and any file that we are waiting information on that we want to place in that drawer, so as the Judge said it is handy for us.

Q. Where was his file? You say it was in the State Director's Office between November, 1954 and July, 1955. What sort of file did you have on him while the original file was away?

A. We had exactly the same type of cover sheet, and it was a dummy file or just another cover sheet.

Q. What was in it?

A. We had a transmittal, I know.

Q. The transmittal is what?

A. It is a Form we have when we transmit the file from our office to another office.

The Court: You say you have a transmittal. You mean you had a copy of the letter of transmittal where you

[fol. 172] had sent the file itself to the State Headquarters?

The Witness: Yes sir, that is right.

The Court: What else, if you know?

The Witness: I don't recall. Any other information that came in for Mr. Venus during the time the file was out of the office was placed in the dummy or duplicate cover sheet.

By Mr. Covington:

Q. There was nothing else in it during that period of time of nine months, was there?

A. I don't recall.

Q. You did recall the transmittal, though, do you?

A. Yes sir, because that is procedure; we always make a transmittal and keep a copy ourselves. In fact, when State Headquarters or Southern Area receive the file we send the transmittal to them in duplicate and they return one copy to us as a receipt, more or less, that they received the file, and that is placed in the dummy cover sheet.

Q. At the former trial—I refer to your testimony at page 47.

Mr. Hornbaker: Which trial is this now?

Mr. Covington: This is the last trial before this one.

By Mr. Covington:

Q. Page 47, line 16. I will ask you whether or not you testified as follows beginning at line 5:

"In other words, when you took that big full file out [fol. 173] and mailed it up to Los Angeles and on to Sacramento where it was sent, at the very place where you pulled the big file out you had there put your index cover sheet back in that same place; is that correct.

"No, I wouldn't put this dummy in a pending file cabinet or Pending file."

Mr. Hornbaker: Counsel, could I have that citation again? My page 47 doesn't read that way.

Mr. Covington: Line 10.

"No, I wouldn't put this dummy in a pending file."

The Witness: I don't recall saying that.

By Mr. Covington:

Q. Will you say you did not say it?
A. I don't recall saying it.

The Court: Let's make a record of this. The question and answer don't jibe. Read the question and answer. The answer may well have been mistranscribed by the Reporter.

Mr. Covington: If it has been, I would like to know it.

The Court: Read the question and answer again.

By Mr. Covington:

Q. The question was:

"In other words, when you took that big full file that is the original file and mailed it up to Los Angeles and on to Sacramento where it was sent, at the very place where you pulled the big thick file out you have there you [fol. 174] put this index cover sheet back in that very same place; is that correct?"

The Court: Read the answer.

Mr. Covington: "No, I wouldn't put this dummy in a Pending file.

"What do you mean? Explain to me about this Pending file. I am confused a bit.

"I think it is also called a 'Suspense file' or something like that. Anyway, when we send a file out to State Headquarters it is put in this, as we call it, a 'Pending file'."

Q. So it was put in a Pending file; is that right? Which is correct, the Pending file or in the Suspense file?

A. They are both the same. Didn't I say that some people call them Suspense files and some Pending? We call it a Pending file in our office.

Q. "You said 'Pending file.' Describe that a little more in detail. Is it a drawer, a box, or—

"It is a filing cabinet, and we have a particular place for it, and by 'Pending' I mean that in this instance the file was out of the office."

Is that correct?

A. If that is what I said, I guess it is.

Q. As the Judge said, maybe the stenographer made a mistake here and has us all confused. I would like to know if you could tell me and the Jury and the Judge what are the facts right now.

[fol. 175] A. I thought I had told you.

The Court: I think the question has been answered. We will check on the other answer. The testimony shows that there are the regular files of some 13,000, there is a Pending or Suspense file in which matters are put.

By Mr. Covington:

Q. You said 13,000. In your former trial you said 18,000.

A. The Judge asked me at that time; he said, how many files did you have at that time?

The Court: After this, if you are going to use a transcript to impeach, I want to see it first in each instance.

Mr. Covington: All right, page 75.

The Court: Let me look at it.

Mr. Covington: Lines 10 and 11.

The Court: You may read it.

By Mr. Covington:

Q. At the former trial you were asked by me, "How many Registrants have you got in your Board?" and Judge Picard said, "You mean at that time, don't you?" and then I said, "At that time."

"Oh, at that time? Oh, I would say around 17,000 or 18,000."

Is that correct?

A. If that is what I said. But since then I have checked [fol. 176] my records.

Q. I see, and you have checked your records to verify?

A. To see how many I did have at that time.

Q. How many do you have?

The Court: Not do you have. You mean, how many did you have? Let's ask it right.

By Mr. Covington:

Q. Tell us now actually how many files you did have at the time?

A. I had between 13,000 and 14,000. I don't know the exact figure.

Q. Then we can correct this former testimony; is that right?

A. Yes.

The Court: That remark may go out. That is not a question. Just ask questions, Mr. Covington.

By Mr. Covington:

Q. How many Registrants or files are in that room where all these Boards are located?

A. Now?

Q. I am talking about then.

Mr. Hornbaker: When you say "then," counsel, what date are you referring to?

Mr. Covington: Between November, 1954 and July, 1955.

The Witness: I couldn't say at that time just how many [fol. 177] we did have. I know approximately now, but I don't recall then.

By Mr. Covington:

Q. Do you recall testimony at the former trial you were asked by me, "How many Registrants were there with all of the other Boards who officed in that room?

"At that time I would say roughly around 50,000."

A. I imagine that is right. I don't know for sure. That is just a guess, approximately.

The Court: That would be of the 6 different Draft Boards?

The Witness: Yes sir.

By Mr. Covington:

Q. Did you ever see a postal card dated sometime in February, 1955 and mailed in Los Angeles, signed by Mr. Venus, advising the Local Board of the change of address at the period when the Draft Board file was out of the office?

A. I don't recall seeing one.

Q. Will you say that such a card was not received?

A. I don't recall seeing one.

Q. Will you read the question?

A. I understand the question.

The Court: She has answered it the best she can. Ask another question.

By Mr. Covington:

Q. Assuming that the card had been received, was it possible that the card could have been misfiled by, say, one [fol. 178] file and placed in a file behind or before the Venus file?

A. Yes, that is possible.

Q. That is possible?

A. Yes sir.

Q. Now then you have told us that this Suspense file is a regular file cabinet that had a lot of files in it that had been taken out of their respective places in the regular place and put in there because there was something being done about it; is that correct?

A. Yes sir.

Q. Either they were awaiting correspondence or else the originals had been sent to Los Angeles or San Francisco; is that correct?

A. Yes sir, that is right.

Q. There were quite a large number of those files in that file drawer at that time, were there not?

A. I don't know. I wouldn't say how many.

Q. I am not asking you, of course—

The Court: Do you have more than one drawer?

The Witness: No, just one drawer for Pending.

The Court: One drawer?
The Witness: Of a four-drawer filing cabinet.

By Mr. Covington:

Q. It would be either the top, second, third, or bottom drawer that you had the Suspense files in; is that right? [fol. 179] A. Yes sir.

Q. When filing is done, say, in the regular—suppose you have a file that is regular in every respect and it is not Suspense, it is nothing you are waiting for and it has not been sent out of the office up to Los Angeles or Sacramento and you are doing filing, how are those files arranged? Are they arranged according to name or according to number?

A. They are filed according to number, to their Selective Service Number.

Q. Explain to the Jury what is the Selective Service Number.

A. This Registrants Selective Service Number is 4-140-29-578. The 4 is in the roll call of the States—California is 4, 140 is the Board Number, 29 is his date of birth and 578 was the Number given him in sequence at the time he registered, and they are given their numbers according to their birth dates, if they register or when they are required to register, and each one of these are filed. Our Filing System is the year—we will take first the 29, that is filed first, and in number sequence, and then the year 30 in number sequence, and so on up that way.

Mr. Covington: Your Honor, may I stand over here, on account of Mr. Barwick being unable to make any suggestions.

The Court: Entirely all right.

Mr. Covington: If you will allow me to do it I will ap- [fol. 180] preciate it.

By Mr. Covington:

Q. We are talking now not about the Suspense type file, but one that nothing has to be done to it.

A. Yes sir.

Q. And that is the majority of the Registrants, are they not?

A. Yes sir, that is right.

Q. So you have those that were born in 1929, say; is that correct?

A. Yes. And I might say also, Mr. Covington, that they are filed according to their classifications, too.

Q. You have a section in the drawer of just 1-A's; is that right?

A. The 1-A's are all filed together.

Q. And then you have other classifications?

A. Yes.

Q. But say under a certain classification they are all lined up according to number, are they not?

A. Yes.

Q. And the man born in, say, January, 1929 would be first, February would be next, and so on down the line; is that correct?

A. Yes sir, that is right.

Q. How is the Suspense files kept? What is the order of [fol. 181] keeping these Suspense or those files, say, in this particular drawer where the dummy is and the original has been sent to Los Angeles or Sacramento or something is being done in the file like awaiting correspondence or something?

The Court: You mean, do you use the same number series?

Mr. Covington: I want to know do you use the number filing system or do you use the name or just how is it?

A. No sir, we use the numbers the same way; they are filed the same way, with the exception that the 1-A's are filed together and the rest of them are filed back of their year of birth in sequence.

Q. In the case of Mr. Venus's dummy file that was there, since it was out of the office from November, 1954 to July, 1955, there would be a file behind him; it wouldn't necessarily be the next number, would it?

A. No sir.

Q. And the one in front of him wouldn't necessarily be a sequent number, would it?

A. No sir.

Q. And when the files are taken out of that Suspense drawer, then they are taken back to the regular file and put according to the age and classification; is that not right?

A. Yes sir.

The Court: And the number series?

The Witness: And the number, yes, surely.

[fol. 182] By Mr. Covington:

Q. Did you make an effort to search the files to see if Mr. Venus had mailed a card to you advising you about his change of address?

A. Since the last trial I have. I have tried to find it, yes sir.

Q. On three previous occasions you were asked whether you had, and you said you had not.

A. Yes sir, that is right.

Q. You never made any search up through the last trial?

A. Not any specific search, no sir.

Q. That is right. And you stated at all these trials that you hadn't?

A. That is right.

Q. What has caused you to make a search since the last trial?

A. Well, it was suggested that we look and see if we could find it.

Q. Who suggested it?

A. The United States Attorney.

Q. Mr. Hornbaker?

A. Mr. Hornbaker; yes sir.

Q. And when did he suggest that?

A. Oh, some time the first part of this year since the last trial.

[fol. 183] Q. Within a month of the last trial?

A. I don't know. It was sometime this year, though, the first part of the year.

Q. Tell us about the search that was made. Who made a search?

A. I searched, Mrs. Huckaby searched.

Q. And you searched where?

A. We looked through all of the year 1929, every file of a Registrant who was born in the year 1929, and also the year 1930, in all classifications.

Q. In all classifications?

A. Yes sir.

Q. What are the number of those as compared to 50,000?

A. You understand, we didn't look in all.

Q. Or 18,000 I'm talking about.

A. I imagine that roughly we looked through some 3000 files at least, searching for that particular card. I mean, making a specific search for that card.

Q. You looked through 3000 files of the year 1929 and 1930; is that correct?

A. No; in those two years I think there are about 2000 or 2100 files. The others were different classifications and different years.

Q. Where did you look for those?

A. You mean—

[fol. 184] Q. Did you just do it at random?

A. No, we would take a specific classification and start at the beginning.

Q. What classification did you take?

A. Well, we looked through 2-A classifications, 1-D classifications, 4-D classifications, 4-C and some 3-A's.

Q. His classification at the time this file was out of your Board was 1-A, was it not?

A. Yes, it was.

Q. And when his file was in the Suspense file it could be next to a man who was born in 1927 or next to a man who was born in 1934, could it not?

A. Yes, it could have.

Q. And when that card came in during the Suspense filing and if there was a misfiling, as you say could happen, he put in the front file or the one behind it, it could be put in a year 1935?

The Court: Reframe your question. The question at issue to be decided by the Jury is whether that card was ever sent in.

Mr. Covington: That is right.

The Court: Reframe your question.

By Mr. Covington:

Q. Assuming that the card was mailed, and you have heard testimony by Mr. Venus on three different previous [fol. 185] trials that he did mail the card in February, 1955, assuming that he did and the situation is as you have described it to the Jury, this dummy file was in that Suspense file drawer.

A. Yes sir.

Q. With a man born in 1935 behind him and a man born in, say, 1924 in front of him, and there was a mistake made in filing that little card if it came in.

A. Yes sir. We don't file them while they are still in the file. We would pull the cover sheet, because if he sent a change of address I would have to pull the cover sheet to note the change of address on the cover sheet.

The Court: You are talking about two ways of filing: one would be to open the drawer and merely thumb through the folders and stick the article in.

The Witness: Yes sir.

The Court: The other is to pull the cover sheet out, put the article in, and then put the cover sheet back in.

The Witness: Where there is a change of address, the cover sheet is always pulled and the address written on it and then refiled.

Mr. Covington: That is right.

By Mr. Covington:

Q. So there could be a mistake made in that filing; is that not correct?

A. Yes, surely there could be.

[fol. 186] Q. Assuming that a mistake was made and then the files were taken out of that Suspense file drawer and these files returned back into the other 18,000 in their proper age place, you wouldn't know where to go to look, would you?

A. No sir.

Q. And isn't that the reason why you didn't make any search after Mr. Venus told you he had mailed the card; it would mean looking through 18,000 files, wouldn't it?

A. Yes sir, if we looked through each one it certainly would.

Q. It would mean looking through 18,000 files. Mr. Venus did tell you, did he not, that he had mailed a card notifying you of a change of address?

A. I believe he did tell me at one time when he was in the office that he had mailed a change of address, and I told him that we had not received it.

Q. That was in the year 1956 when he paid a visit to the Board, wasn't it?

A. I believe so, yes sir, if I remember correctly.

Q. And of course he also wrote you a letter in the latter part of 1956 specifying that he had mailed a card, did he not?

The Court: The latter part of 1956?

Mr. Covington: Yes sir.

The Court: After April 9, 1956?

[fol. 187] Mr. Covington: Yes, that's right. This is relating to Count 3.

The Court: Let's see the indictment.

Mr. Covington: The third count charges him with failing to keep the Local Board advised of his address or place where mail is likely to reach him.

The Court: The third count charges that on or about February 1, 1955 Venus failed to perform, etc. by keeping them advised. So that matters happening after April 9, 1956 will not be considered by you. The Jury are instructed to disregard the question.

Mr. Covington: I except to the ruling of the Court. And we would like to state the ruling the Court has made is pertinent to the second indictment about continuing duty.

The Court: I am also ruling that on the third count, which charges that on February 1, 1955 he failed to keep the Board notified of his address, that what he did thereafter has nothing to do with the charge made on that date.

Mr. Covington: We submit that it bears on the question whether he did actually advise them, and did he unlawfully fail to advise them.

The Court: You are talking about some date, I think, in August, 1956.

Mr. Covington: That is right; August, September or October.

[fol. 188] The Court: My ruling still stands.

By Mr. Covington:

Q. In any event, since January on, when Mr. Hornbaker, Assistant United States Attorney, asked you to make this search through these 1929 and 1930 years and these few other files you had mentioned, you haven't made any effort to go through all of that 18,000 files that were at the Board at the time, have you?

A. We searched through all we had the time to. We don't have time to go through them all.

Q. You didn't go through the remaining 18,000 over and above the 2500 that you mentioned; is that right?

A. No, we didn't.

Q. Did Mr. Venus tell you also that he had not received that classification card that you mailed up to Modesto, you testified?

Mr. Hornbaker: I object to that as being irrelevant and immaterial, your Honor.

The Court: Without more specificity it is.

By Mr. Covington:

Q. When Mr. Venus talked to you in August, 1956, I believe it is—what was the date that he came to the Board?

A. I don't recall the date, sir.

Q. Could it not have been around the middle of the year 1956?

[fol. 189] A. I wouldn't know without looking it up.

The Court: Could you tell from the file?

The Witness: If he is speaking of the time he came to copy part of the file—is that it?

Mr. Covington: Yes.

The Witness: Then I think at that time he brought a friend with him, and there is something in the file. I don't know if it is this part or the other.

Mr. Covington: Suppose you take a look and see.

The Witness: All right sir. I don't think it is in this part of the file.

The Court: Look at this, (handing document to the witness).

You are certain that this happened about the middle of 1956?

Mr. Covington: That is the best of my recollection.

The Court: Then I will not permit the conversation to go before the Jury.

Mr. Covington: All right. The former testimony and the former ruling, as you recall, related to statements about the Order to Report. This relates to the card.

The Court: I don't care what it relates to.

Mr. Covington: I am just having to make my offer, that is all.

The Court: I understand your position. I want you to understand mine. I take the position that what has hap-
[fol. 190] pened after the date an offense is alleged to have been committed is not admissible in a criminal trial. Now the latest date shown in any of the three counts is April 9, 1956.

Mr. Covington: That is correct.

The Court: That is the latest possible date. Therefore, I am excluding what Mr. Venus did or said after April 9, 1956.

The Witness: I found the letter you were referring to. This was in 1957, this one.

Mr. Covington: That is right. I was wrong as to the year.

By Mr. Covington:

Q. In Government's Exhibit 1 I direct your attention to a letter dated August 21, 1956, being paper 181 in the file.

Mr. Hornbaker: Counsel, that is not in Government's Exhibit 1.

Mr. Covington: I had forgotten that.

The Court: It is part of the other part.

Mr. Covington: Your Honor said you would defer ruling on that and I had forgotten it was in a state of suspense.

Mr. Barwick: Exhibit 1-K, I believe, your Honor. It is not photostated. I believe it is the original.

The Court: I ruled on it already, but I will rule again. My notes show that I denied its admission into evidence, and it is excluded because it is dated August 1, 1956.

Mr. Covington: There is a letter in Government's Exhibit [fol. 191] 1 that is dated April 9, 1956. Will you please find that?

The Witness: Yes sir, I have it.

Mr. Covington: Do you have it?

The Witness: Yes sir.

The Court: I permitted that one to remain. What is that page?

The Witness: 179.

Mr. Covington: Read that would you please.

The Witness: Yes sir. This is from:

"Carlin Venus
756 Pier Avenue, No. 1
Santa Monica, California

April 9, 1956

Local Board 140
Fox Theatre Building
San Diego, California

Re: No. 4-140-29-578

Dear Sirs:

This is to notify you of my new address. It is 756 Pier Ave., Santa Monica, California.

For your added information as to my activities, I am a pioneer minister assigned by the Watch Tower Bible and Tract Society to serve in that capacity in the Venice Congregation, Ocean Park Unit, Jehovah's Witnesses, and have been such since August, 1955. Please send my latest classi- [fol. 192] fication and any other information of which I should be aware.

"The message contained in this enclosed tract will, I hope, be of comfort to you and serve to increase your understanding of world conditions in the light of bible prophesy.

"Thanking you for any consideration shown in my behalf,

Sincerely,

/s/ CARLIN VENUS."

The Court: Finish reading the letter.

The Witness: "Ordained Minister of God

"P.S. I was married on December 31, 1955."

The Court: The record will show that the letter was mailed on April 9th at 12:00 P.M. and was received in San Diego on April 10th at 10:00 A.M. and stamped by the Local Board—when I say received at 10:00 A.M. I am talking about the Post Office Stamp on the back of it: San Diego, April 10, 10:00 A.M., 1956: and the letter itself is stamped "received by the Local Board April 10, 1956."

I have permitted this letter in evidence because this letter is right at what I consider to be the cut-off date in the case.

By Mr. Covington:

Q. In that letter he requested any information that he needed; is that correct?

A. Yes sir, he did.

Q. And he wanted to know about his latest classification. [fol. 193] He said, "Please send my latest classification and any other information of which I should be aware." Did you answer that letter?

A. No sir, I did not directly to him, no sir.

Q. Did the Board direct you to answer that letter to him?

A. No sir.

Q. Why did you not answer the letter to him?

A. Because under our Regulations when a Registrant has been reported to the United States Attorney, then the matter is taken from the Local Board's hands. It is in the jurisdiction of the United States Attorney. I did write the United States Attorney a letter informing them of Mr. Venus's address.

Q. And his request?
A. And his request.
Q. Did you send a copy of your letter?
A. To Mr. Venus?
Q. Yes.
A. No sir. I did not.
Q. No, I am not talking about to Mr. Venus. A copy of Mr. Venus's letter to the United States Attorney?
A. No sir. I didn't.

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[fol. 196] The Court: The only photostat we have now which we received in evidence as part of the Selective Service file is Exhibit 1-H.

Mr. Covington: Yes.

The Court: And I am suggesting that it stay in evidence as Exhibit 1-H, but that we find those original sheets which have been sorted out from Exhibit 1 and put those original sheets in Exhibit 1, so that Exhibit 1 becomes a complete Selective Service file plus the Registration Card, which is an original.

Mr. Covington: Yes.

The Court: And if counsel will do that at their convenience, it would help the Clerk. We will take care of it that way.

Mr. Covington: Yes sir.

The Court: Counsel for the Government has stated or [fol. 197] suggested that as to this cut-off date of April 9, 1956 there should be some reasonable extension to permit defendant to show, if he can, or desires to, that within some reasonable period after April 9, 1956 he complied with an obligation, if he had such an obligation—which, of course, will hinge upon the instruction the Court gives you as to the law—and I am content to permit some reasonable period of 30 or 60 days—what would you suggest, 60 days?

Mr. Hornbaker: Yes, your Honor.

Mr. Covington: Of course, your Honor, I think that actually it goes right down to the date of the indictment. I just want to let the record show that I am not agreeing to this.

The Court: The record will so show. But I will permit a 60 day period after April 9, 1956.

Mr. Covington: And is that to be considered as the statutory or a reasonable time?

The Court: I don't think it is necessary at all. But counsel, out of an abundance of caution has urged that I allow proof of some. I think 30, 60 days—and I have said 60—certainly would be a reasonable time.

Call your next witness.

DEFENDANT'S PRIOR TESTIMONY READ INTO RECORD (EXCERPTS)

Mr. Hornbaker: At this time, your Honor, I desire to read into the record parts of the testimony of the defendant Venus at the prior trial, and counsel has stipulated [fol. 198] that these portions of the prior trial may be read from the transcript.

The Court: Which prior trial? The one in December last year?

Mr. Hornbaker: From both prior trials; from the one in August 1959 and from the one in December of last year.

The Court: All right, proceed. Give counsel a page reference.

Mr. Covington: Identify your transcript and give the page.

Mr. Hornbaker: I will.

I am first going to read from the transcript of the testimony on August 26, 1959 before the Honorable Jacob Weinberger, at page 24, lines 1 through 6, inclusive. This is the testimony of Mr. Venus.

Mr. Covington: Direct examination.

Mr. Hornbaker:

"Q. When was it that you first learned of the outstanding Order commanding you to report for induction which has been read into evidence and which is in evidence in Government's Exhibit 1, dated in October, commanding you to report on November? When did you learn about that Order?

"A. In April, 1956."

Now I will read from the testimony—

Mr. Covington: It is on a cross examination.

Mr. Hornbaker: On either August 26, 1959 or August 27, 1959, before the Honorable Jacob Weinberger, page 83 [fol. 199] and 84 beginning with line 23 on page 83 and ending with line 17 on page 84.

The Court: This is Cross Examination now?

Mr. Covington: Yes it is.

Mr. Hornbaker: Yes, your Honor.

"Q. Now, when did you first know that you had been ordered to report for induction?

"A. You mean the second time?

"Q. The second time.

"A. April, 1956.

"Q. Who told you that you had been ordered to report for induction.

"A. The F.B.I. Agent in Los Angeles. He came to the place of my part-time employment.

"Q. Did you know that an Order to Report for Induction meant that the Army wanted you?

"A. Not in reality.

"Q. What did you think an Order to Report for Induction was?

"A. It was a notice to report for induction to be inducted into the Armed Services. That is what the F.B.I. Agent stated.

"Q. You knew that it was a call from the Army, didn't you?

"A. Yes, that is what he stated."

[fol. 200] I now will read from the proceedings on December 10, 1959 before the Honorable Frank A. Picard, beginning at line 25 on page 185 and concluding—

Mr. Covington: You told me 179.

Mr. Hornbaker: Also 185.

Mr. Covington: Which are you going to read first?

Mr. Hornbaker: Page 185.

The Court: Line 25, page 185 to where?

Mr. Hornbaker: To and including line 8, page 186.

The Court: Direct Examination of Mr. Venus?

Mr. Covington: Yes, it is, your Honor.

Mr. Hornbaker:

"Q. Did you ever receive through the United States Mail or by personal delivery at the hand of another person this Order to Report for Induction that the record shows on October 28, 1955 was prepared for entry here in the minutes mailed? Did you ever get that?

"A. No.

"Q. When was it you first learned of the existence of that Order?

"A. From the F.B.I. Agent in April, 1956."

I will now read from the proceedings on either August 26, 1959 or August 27, 1959 before the Honorable Jacob Weinberger, beginning at the line 16 on page 83 and ending at the line 22 on page 83, and this is Cross Examination of Mr. Venus:

"Q. Do you know that you are supposed to keep your [fol. 201] Local Board notified of your Change of Address?

"A. I did.

"Q. When did you first become aware of the fact that you had to keep the Local Board informed of your address?

"A. I always knew I had to keep the Board informed of my address."

Mr. Covington: You said "the Local Board." Actually, it is "your Local Board."

Mr. Hornbaker: I am sorry. That is correct.

I will now read from the proceedings on December 10, 1959 before the Honorable Frank A. Picard, Direct Examination of Mr. Venus, beginning at line 12 on page 179 and ending on line 25 on page 179:

"Q. What was your residential address at Modesto?

"A. 1431 Tenth Street.

"Q. Where is that, in relation to the place where you worked?

"A. That is the same place.

"Q. The same place then? How long did you live at that address?

"A. Until February, 1955.

"Q. What time was it that you departed or left from Modesto?

"A. In February, 1955.

"Q. Was it the latter part or just when? What part of [fol. 202] the month was it, approximately? Not necessarily the exact date.

"A. The beginning of February."

Now I will read from the proceedings on December 10, 1959 before the Honorable Frank A. Picard, beginning with line 3, page 182 and ending with line 14 at page 182.

Mr. Covington: Omitting seven and eight.

Mr. Hornbaker: And omitting lines six and seven on page 182.

Mr. Covington: Isn't it seven and eight?

Mr. Hornbaker: No, six and seven.

I will read all of the testimony on page 182 beginning with line 3 and including line 14.

The Court: Direct Examination of Mr. Venus?

Mr. Covington: Yes sir.

The Court: "Direct Examination," in each instance, means that he was examined by his own counsel in his own defense.

Mr. Hornbaker:

"Q. In the early part of February you came to Los Angeles. Before you left Modesto did you leave a forwarding address card in the office of the United States Post Office?

"A. Before I left Modesto?

"Q. Yes.

"A. No.

"Q. Did you ever send a forwarding card up there?

"A. No.

[fol. 203] "Q. Actually, before you abandoned, or rather after you abandoned your residence in Modesto, did you ever send a forwarding card there?

"A. No."

GOVERNMENT RESTS

Mr. Hornbaker: The Government rests.

Mr. Covington: We will call Mr. Venus to the stand, your Honor.

CARLIN CONSTANTINE VENUS, The Defendant herein being first duly sworn upon his oath, was examined and testified as follows:

Direct examination.

By Mr. Covington:

Q. Will you please state your address.
A. 756 Pier Avenue, Santa Monica, California.
Q. What is your age at the present time?
A. 30 years.
Q. Your birthday?
A. December 19, 1929.
Q. Where were you born?
A. Detroit, Michigan.
Q. What is the name of your father?
A. John G. Venus.
Q. And your mother?
A. My mother is deceased. She passed away a few years ago. Her name was Thelma Louise Meyers.
[fol. 204] Q. Where does your father live?
A. He lives with me at 756 Pier.
Q. After your birth in Detroit, where were your early years spent?
A. In Detroit, Michigan.
Q. How old were you when you moved away from Michigan to California?
A. About 15 years of age.
Q. Did you accompany your family when you left Michigan? Did they move or your parents move and bring you here?
A. Yes, they moved to Chula Vista, California, to 184 National Avenue, and then I naturally was with them.
Q. Where did you go to school.

A. Sweetwater High School.

Q. At what place?

A. It is in National City.

Q. Then following your graduation from High School, you were required to register under the Draft Laws; is that correct?

A. Yes sir.

Q. And then you were required to file a questionnaire; is that right?

A. Yes sir.

Q. And you did that?

A. Yes sir.

Q. And you filed other papers in the Draft Board; is [fol. 205] that right?

A. Yes sir.

Q. And there were considerable proceedings that are shown in Exhibit 1, a number of classifications and appeals and reprocessing. I don't want to go into a repetition of all of that. But I want to ask you whether at any time you were prosecuted in Los Angeles?

A. Yes sir.

Q. Now then, at that time, you were out on bond; is that correct?

A. That is correct.

Q. And the F.B.I., did they know about your residence and your address?

A. They did.

Q. Did you keep them informed and the United States Marshal as to where you could be reached?

A. I did.

Q. And what period of time were the proceedings pending up in Los Angeles? Do you remember when they started and when they ended?

A. They began around the Fall of 1954 and they ended in July, 1955.

Q. When they ended who notified you about the termination of the proceedings?

A. The Attorney.

[fol. 206] Q. The Attorney. Your attorney in Los Angeles, is that right?

A. Yes; Mr. Harold Shire.

Q. Where is he located?

A. In Beverly Hills.

Q. I would like to take you back to the year 1954, in April, I believe it is, or June rather, 1954. You moved from San Diego to Modesto, is that correct?

A. Yes sir.

Q. Before you moved did you do anything with the Local Board?

A. I did.

Q. What?

A. I wrote them a letter, told them that I was going to Modesto for secular employment that would be part-time employment to assist me in the ministry, and I told them that I could be reached at this new address, 1431 Tenth Street, and then I signed it at the bottom, my name, and I said I could be reached at my parents address in one or two days, my San Diego home address.

Q. In the envelope that you mailed—it is in evidence here and Government's Exhibit 1 shows it, but tell me what return address did you have on the envelope that went to the Local Board?

A. 650 Eleventh Street, my parents address.

[fol. 207] Q. What did you do after writing that letter in June?

A. Went to Modesto.

Q. And when was it that you arrived in Modesto?

A. Just a short time afterward.

Q. What sort of work were you doing up in Modesto, your secular work? Your full-time work, I believe you told us, was the ministry up there; is that right?

A. Yes sir.

Q. What kind of other work were you doing to sustain you in the ministry?

A. It was physical instruction and massage in a gymnasium.

Q. Who were you working for?

A. Harold Morrison, Jr.

Q. I believe the Delinquency Notice Mrs. Haisch read from about an hour ago showed some construction company up there, too. Is that a mistake?

A. That is down here.

Q. That was your employer in San Diego?

A. Yes sir.

Q. But that notice does not show that distinction. It indicates that you were a Physical Instructor as well as working for the Contracting Company in Modesto. So the Morrison statement in the Delinquency Notice is correct, but the contractor's statement as being in Modesto is incorrect; is that right?

[fol. 208] A. Yes sir.

Q. You only had one employer in Modesto; is that right?

A. Yes sir.

Q. When did you start to work for Mr. Morrison?

A. In June, 1954.

Q. And what address did you have there?

A. 1431 Tenth Street.

Q. Tell us about this building at 1431 Tenth Street.

A. It was a large gymnasium and it was for physical correction, to help people to recondition their body, and there was a steam room and there was a large compartment in the back and there were several individual booths in connection with the building so that different people could have access to different booths for their massage, etc.

Q. Where did you live? This building where you worked, did you live in the same building?

A. Yes sir.

Q. Did you have a place to sleep there?

A. Yes.

Q. Reside there?

A. Yes.

Q. And who operated the building?

A. Harold Morrison, Jr.

Q. How long did you work there? For what period of time? From what date to what date?

[fol. 209] A. I worked there from June of 1954 until the beginning of 1955, but then because of the employment I came back to Los Angeles.

Q. Let's get into that. You told the Jury you came back to Los Angeles. You had to come to Los Angeles how many times incidental to that prosecution the file shows was later dismissed by the Government?

A. Very many times. I didn't count all of them.

Q. Would it average once every week or two weeks?

A. I would say approximately every two or three weeks until it was dismissed.

Q. What caused you to leave Modesto?

A. The employment had run out at the gymnasium and to sustain myself in the ministry I had access to another occupation to sustain myself part-time, working part-time in Los Angeles with a friend. So I thought it possible, or I deemed it necessary to move to Los Angeles.

Q. When was this, approximately?

A. This was February, 1955.

Q. After arriving in Los Angeles did you locate a temporary abode, a temporary place to live?

A. Yes sir.

Q. And who were you living with in Los Angeles?

A. Edwin Biel.

Q. What was your relationship with him?

[fol. 210] A. Well, he also was a minister, and he had been logging up at Eureka and Oregon and he had mentioned that he was thinking about clearing land down here instead of cutting big trees, because there are no big trees in the L.A. area, and he said I could assist him and it would sustain me in the ministry and him, too.

Q. When you say down here, you mean in the Los Angeles area?

A. Yes, in the Los Angeles area.

Q. What address did you have as a temporary residence there in Los Angeles when you came down from Modesto in February, 1955?

A. It was 2012 West Sixth Street.

Q. How long were you down here in Los Angeles at that address before you had any further dealings, if any, with the Local Board?

A. Approximately 10 days. I wrote the Board of my parents' address because of living with Mr. Biel.

Q. Let's go into that in a little greater detail so that the Jury will understand exactly what you did and when it was, and just tell the complete sequence of events. Do you remember about what day it was or what week of the month of February it was?

A. I don't remember what day it was, but it was about the 20th of February. I am not positive of the date. But [fol. 211] we had taken off work to get some tools for work, and I took off work to obtain a Money Order, and I took off work purposely to mail this card to the Draft Board to change my address.

Q. You say to mail a letter. A letter where and for what purpose?

A. It was to a friend. It was a friend down here.

Q. Was it a man or a woman?

A. A woman.

Q. What did you send the money for? What were you going to send the money for?

A. I thought she needed it because she was in the full time ministry and she didn't have any occupation to speak of—she was just working part-time.

Q. Was she a friend of yours?

A. Yes sir.

Q. While you were in San Diego?

A. Yes sir.

Q. How old a lady was she?

A. Well, I think she was about 60 then.

Q. Did you write her a letter?

A. I believe I just sent her the Money Order.

Q. If that is the case, I will ask you this: did you have occasion to go to the Post Office on the day that you have mentioned to the Jury that you took off from work?

A. Yes sir.

[fol. 212] Q. Before you went to the Post Office, where had you been?

A. We had been at the apartment that is about a half a block across the street.

Q. From where?

A. From the sub-station, from the Post Office. It was a Los Angeles sub-station, and the apartment building was cater-corner from the Post Office. The Post Office was about in this vicinity, and the apartment building would be about here. So we just walked up to the corner and then crossed the street and came into the Post Office.

Q. Who was with you?

A. Mr. Biel.

Q. When you walked into the Post Office what did you do?

A. Well, I had to pull my wallet to get the money for the Money Order, mail the Money Order, and I obtained a Government envelope and Money Order. I also obtained a post-card, a Government post-card.

Q. That was at the window where you got these; is that correct?

A. Yes sir.

Q. And then when you got these two items or three items at the window, a Money Order, the envelope and the post-card, what did you do?

A. I addressed them.

[fol. 213] Q. Where did you go to address them? Did you stand at the window?

A. No, I went over to the desk.

Q. And then what?

A. And then I began to fill them out, and then I filled it out and then mailed it.

Q. Filled out what?

A. Filled out the Government envelope and addressed it to Mrs. Bertha Leonard down here in San Diego and I also filled out the card in connection with my address change from Modesto to San Diego, giving them my parents' address.

Q. What did you do with the Money Order?

A. I mailed it.

Q. Did you put it in the envelope first?

A. Yes sir.

Q. Was this a Government stamped envelope?

A. Yes sir.

The Court: You say you put your parents' address on it. What address was that you say you put on the post-card?

The Witness: That was 1120 Thirtieth Street, your Honor.

The Court: That is a different address.

The Witness: That was the San Diego address.

The Court: That was the San Diego address, but that is a different address from the place your parents had formerly lived?

[fol. 214] The Witness: Yes, because they had just moved and I had just helped them move.

The Court: Previously they lived at 650 Eleventh?

The Witness: Yes, your Honor.

The Court: So the 30th Street address was the one you put on the post-card?

The Witness: Yes sir.

By Mr. Covington:

Q. You had come down to San Diego and helped your parents move from the old address?

A. Yes sir.

Q. What was the old address?

A. 650 Eleventh Street.

Q. When was that with respect to the time you mailed the card?

A. It was just the previous week-end before I mailed the card.

Q. You had been down here the previous week-end, helped your family move from the old address over to this new address?

A. Yes sir.

Q. And that is the one you say you put on the post-card?

A. Yes sir.

Q. The post-card that you had was a Government stamped post-card; is that correct?

A. Yes sir.

[fol. 215] Q. And you got that at the window there?

A. Yes sir.

Q. On the front part of it where the stamp is, what did you write, if anything?

A. I wrote the Draft Board's Address, and I wrote the return address of my parents.

Q. At what address?

A. At 1120 30th Street.

Q. And when you say the address of the Draft Board, can you remember the address and repeat it?

A. Sometime I can, and sometime I can't. But if I can't, I just pull out my wallet. I had my wallet out anyhow to get the Money Order and I just looked at it.

Q. You took the Draft Board address off your Draft Board Card then; is that correct?

A. Yes sir.

Q. And wrote it there. And then did you write a message on the other side?

A. Yes sir.

Q. Tell the Jury in substance what you put on the back of that card in the form of a message?

A. I said: Dear ladies and gentlemen: This is to inform you of my new address. This is my new home address, the address of my parents, 1120 30th Street, and told them that I was no longer at Modesto, California; that all mail [fol. 216] could be reached at my parents home address and that all mail should come to this new home address in San Diego. I said that the—it was very brief. That is about what it was.

Q. Did you sign it?

A. Yes sir.

Q. How did you sign it?

A. Carlin C. Venus.

Q. And then when you had the card made out in the manner that you have described to the Jury, what did you do with the card?

A. I mailed it.

Q. How did you mail it?

A. I went over to the Letter Box, the drop, and dropped the Money Order and the card together.

Q. This was in February, 1955; is that correct.

A. Yes sir.

Q. The Draft Board file in this case shows, according to the entry made in the back of the Classification Questionnaire, which has been identified by the Clerk and which also is in evidence, an entry showing that a 1-A Classification Card was mailed to you by the Local Board, and the testimony shows it was mailed to you at the Modesto address on September 2, 1955. Did you ever receive that card?

A. No sir.

Q. The record in this case also shows, the Draft Board [fol. 217] Record, the Questionnaire, or rather the minutes that you have just referred to, and the file shows an Order to Report for Induction, which has been read into the evi-

dence by the Clerk of the Local Board, it is on page 168, it shows an Order dated October 28, 1955, it is in Exhibit 1, but I will show you a photostatic copy of the file of page 168, and I will show you that it refers to yourself, Carlin Constantine Venus, Modesto, California, on October 28, 1955. Did you ever receive or see that Order?

A. I saw it in 1957.

Q. Was that for the first time?

A. Yes sir.

Q. And where was that?

A. That was at the Local Board.

Q. When you visited the Local Board?

A. Yes sir.

Q. Coming back to October 28, 1955, the date that that Order was mailed, were you living in Modesto at that time?

A. No sir.

Q. Where were you living?

A. At that time I was living at 2006 Strongs Drive, Venice, California. That is right near Santa Monica, about a mile apart.

Q. According to your testimony just given, you had mailed to the Local Board giving them your parents address?

[fol. 218] A. Yes sir.

Q. Why was it you notified the Board of your parents address rather than of these various addresses of temporary abode, that you had?

A. Because Mr. Biel and myself were traveling from place to place in the L.A. area to cut trees and we were moving about and we knew that we were going to move, and I knew that the Board had to have a permanent address, so I wanted them to have my parents' address, and by having my parents' address they could always contact me by means of my parents. I figured that would be the absolute way of contacting me.

Q. Did your parents know where you were at these various places that you moved from week to week?

A. Yes sir.

Q. I meant to say did your parents know from week to week where you were regardless of where you moved or when you moved; is that right?

A. Yes sir, that is right.

Q. Did you ever receive the card, the Classification Card?

A. No sir.

Q. There is a 1-A Classification Card that was addressed to you at Modesto. Did you ever get that?

A. No sir.

Q. Did you leave a forwarding address when you left [fol. 219] Modesto?

A. No, I did not.

Q. Why didn't you leave a forwarding address when you left Modesto?

A. I knew that my parents knew where my whereabouts were. I knew that all of my friends did. The main contact I have, the Watch Tower Bible Tract Society, also knew, because I had written and informed them. And so I just didn't make a forwarding address in that connection.

Q. After leaving Modesto, within what period of time was it that you notified the Local Board?

A. It was within 10 days.

Q. That was in February, 1955, was it?

A. Yes sir.

Q. That was how many months before that Classification Card in September?

A. They said they sent this Card in September, 1955, but it would be—February, March, April, May, June—it would be approximately five months.

Q. You had notified the Board, according to the testimony you have given, by this postal card before the Draft Board Order ever issued; is that right?

A. Yes sir.

Q. Following the mailing of the card, when was it that you first learned anything had transpired in connection [fol. 220] with your Draft case?

A. I didn't know anything about it until April of 1956, when an F.B.I. Agent had contacted me.

Q. Tell us about that.

A. Do you want me to tell the conversation?

Q. Yes. Well, where it was, when it was?

A. Well, it was at Physical Services.

Q. And what happened?

A. It was the place of my part-time employment. You see, I only work a few hours a week to sustain myself in the ministry, and at this time I happened to be working there, and this Mr. Irving Weeks had come in and introduced himself and said he would like to talk to me in connection with some delinquency, and in the conversation he asked me many things and I answered many things.

Q. Tell us what these many things were? Whatever you can remember, tell us the conversation.

Mr. Hornbaker: Your Honor, I want to object to any testimony by this witness as to what Mr. Weeks may have said, since Mr. Weeks is no longer alive.

Mr. Covington: You had the opportunity at the last trial to produce Mr. Weeks.

He had him at the last trial, and he sat in the Courtroom throughout the entire proceedings, and Mr. Hornbaker saw fit not to put Mr. Weeks on the Stand at any time [fol. 221] during the trial. Now, Mr. Weeks has died, and that is no reason why this man cannot tell what happened on April 9th inasmuch as Mr. Hornbaker himself has already injected the matter into the case by the reading of the testimony as to what Mr. Venus said about what transpired on April 9th with the F.B.I. man at the previous trial. I don't think the objection is well taken. Anyhow, it is a Government representative of the Department of Justice who called to talk to him about the alleged delinquencies that are referred to in the ' raft Board file.

The Court: What authority do you have for your objection?

Mr. Hornbaker: Your Honor, I have no cases at my disposal at the present time. I am only invoking the rule of evidence which is more familiarly known as the deadman statute, I believe.

The Court: Does that apply in criminal cases?

Mr. Covington: I don't think so. And besides, he is not a party to the case.

The Court: It would be the test in a civil case whether he is a party or not.

Mr. Barwick: In a civil case, the test usually is whether the testimony is being used against him and he is a party

to the action. Here the F.B.I. man is not a party to the action.

The Court: Objection is overruled.

By Mr. Covington:

Q. Tell us as best you remember. You don't have to tell [fol. 222] us word for word. The substance is all right. But tell us what took place in the way of conversation. All you have to do is testify what you remember you said and what you remember he said. Just take it step-by-step.

A. Mr. Weeks introduced himself, and he was very polite. He asked me my name and so on, and I confirmed it. And he said there were certain delinquencies—

Q. You said "I confirmed it."

A. Yes.

Q. You said "That is my name"?

A. Yes sir.

Q. Put it that way instead of "I confirmed it." That is objectionable because it doesn't tell the facts.

A. I am sorry.

The Court: Go ahead.

The Witness: I told Mr. Weeks that—first of all, he said that there are certain delinquencies in connection with the Draft Board of your not reporting for induction.

And I said that, "I did report 2 years ago for induction." I said, "I don't know what your records show, but I did report, and I refused induction openly as being an ordained minister."

And Mr. Weeks says, "Well, there must be some mistake," in this vein.

And I said, "What should I do? What do you mean?"

He says, "Well, I believe that the Draft Board is con- [fol. 223] sidering a second time."

I said, "I don't know what you're talking about. Because if I would have received my Induction Notice I would have reported," because I told him my status. And then I asked him, "What should I do now? Should I report?"

And he said, "It is too late now. That was about six months ago."

I said, "Well, what procedure should I go through? Should I go down to the Draft Board or write the Draft Board?"

He said, "Well, it is not for me to say." But as a suggestion he said, "It might be well if you just told them of your address and maybe the whole thing could be straightened out."

Then he asked me many questions in connection with the Jehovah's Witnesses. He said, "Why don't Jehovah's Witnesses go to war?"

I said, "The reason Jehovah's Witnesses don't go to war is because they love one another."

Mr. Covington: I don't think that is relevant.

The Court: I don't think so either.

Mr. Covington: I agree with you. But this is a surprise to me; it didn't come into the interview before.

The Court: Let's skip the religious conversation you had.

By Mr. Covington:

Q. Tell us what, if anything, took place in respect to [fol. 224] your knowledge or notice of the Order to Report for Induction or the 1-A Classification Card, no more than that, and as to what you should do, if anything.

A. Well, just what I have said.

Q. You have covered it all; is that right?

A. As far as the detail in connection with the Board is concerned.

Q. How long was he there with you?

A. Oh, probably an hour.

Q. Was the conversation mostly about the religious doctrines of Jehovah's Witnesses? Was that it?

A. Yes sir.

Q. After he was there, did he give you any—did he tell you that you would have to go and comply with that Order, or just what did he say?

A. No sir. I said that all of Jehovah's Witnesses comply with Draft Board Regulations because as ordained ministers it is our duty and we comply with the law.

And he said that "We realize that." He said, "The F.B.I. has no quarrel with Jehovah's Witnesses at all. In fact, we

believe the country would be better off if all people were like them as far as citizens were concerned." And he said the thing would probably be straightened out if I would just write the Board and notify them of my address, and they would notify me.

[fol. 225] And that is exactly what I did a day later.

Q. There is in evidence here a letter that is dated on April 9th and it has been read into evidence and it is in the file and it shows, among other things, that you told them what you were doing, and also added that you wanted to know your latest classification and any additional information.

A. Yes sir.

Q. Did you get an answer to that letter?

A. No I did not sir.

Q. Was that letter written by you in response to the advice by the F.B.I. Agent?

A. Yes sir.

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By Mr. Covington:

Q. Anyway, did you ever hear from the Local Board after you wrote that letter?

[fol. 226] A. No, I didn't.

The Court: After you talked to this F.B.I. Agent, the next week or so, did you go down to the Board to see what was going on?

The Witness: No, your Honor, I wrote them again, and then I received a letter from the United States Attorney saying that there were certain delinquencies in regard to my status, and then I wrote him another letter and I wrote the Draft Board another letter and I didn't get any answer. So, after the third time, I went down to the Board.

The Court: When you went down to the Board, this was along after August, 1956.

The Witness: Yes sir.

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[fol. 227] By Mr. Covington:

Q. You did report for induction before, according to the record; is that right?

A. Yes sir.

Q. And you refused to submit to induction, you have already told the Jury, because you were a minister; is that right?

A. Yes sir, that is correct.

Q. How many times were you in Court between the middle of 1954 and July, 1955, in the Federal Court in Los Angeles?

A. I would say approximately about 12 times.

Q. How many times after February, 1955?

A. About twice.

Q. The United States Attorney there called the case in Los Angeles; is that right?

A. Yes sir.

Q. Did the F.B.I. and the United States Attorney know where you were at that time?

A. Yes sir.

Q. Did the Local Board, either through it's Clerk or by any Board Member, ever notify you that you should comply with this Board Order?

A. No sir.

Q. Did you ever ask what to do in respect to that Board [fol. 228] Order in conversation with the Board?

A. Yes sir.

Q. And what did you ask?

Mr. Hornbaker: I object to that unless we get this placed as to the date on which this occurred, your Honor.

The Court: I take it this happened after August, 1956.

Mr. Covington: Yes, this is a thing we will have to get into the offer of proof, I guess.

The Court: Yes.

By Mr. Covington:

Q. Did any member of the Board of any officer of the United States Government ever at any time inform you that you had a duty to report day-by-day after the Order had been issued and after you learned of it in April?

A. No sir.

Q. If you had been notified or informed, what, if anything, would you have done?

A. If I was notified, I would have reported immediately.

Q. Would you have submitted to induction after reporting?

A. No sir.

Q. For what reason?

A. Because I am an ordained minister.

Mr. Covington: That is all.

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[fol. 232]

San Diego, California, Tuesday, May 10, 1960
2:00 P.M.

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CARLIN CONSTANTINE VENUS, the defendant herein, having been previously duly sworn, on his oath was examined and testified further as follows:

Direct examination resumed.

By Mr. Covington:

Q. Mr. Venus, I inquired of you on Friday about the interview that took place between you and the Agent of the Federal Bureau of Investigation, Mr. Weeks. Do you remember that?

A. Yes sir.

Q. Do you know about what day that was or what time of day it was that day?

A. Yes, it was in the afternoon, about 3:30.

[fol. 233] Q. And how long did that interview last?

A. At least an hour.

Q. If you had been notified by the Agent that you were required to report that day in San Diego, would you have done so?

A. I would have.

Q. Or tried to?

A. I would have tried to; yes sir.

Q. On the 9th of August; is that correct—I mean April 9th?

A. April 9th.

Q. Yes.

The Court: Was it about April 9th that you talked to this Agent?

The Witness: Yes, your Honor.

By Mr. Covington:

Q. Was it on that day, April 9th?

A. Yes sir.

Q. Do you have any way of fixing that in your mind as being April 9th? Have you had an opportunity to make any check since Friday to verify the date?

A. Yes, I have. My employer recognizes the date and I recognize the time of the day also.

Q. What time did the interview discontinue or cease?

A. Approximately at 4:30.

[fol. 234] Q. If you had attempted to come to San Diego on that day by car would you have had time to have gotten down here before the close of the business day?

A. No, I could not.

Q. Do you know approximately when it is that the Draft Board office closes business at the end of the day?

A. Yes sir.

Q. What is it?

A. 5:00 P.M.

Q. When was it that you moved away from Modesto?

A. In February, 1955.

Q. And what date was it that you left Modesto to return or rather to come down to Los Angeles?

A. It was on a Monday.

Q. On a Monday?

A. Yes.

Q. Can you approximate the date now or have you any way of fixing it in your mind as to whether it was the approximate date?

A. I specifically made a check on the date, and I reconstructed by means of the calendar when I moved and

when my parents moved and when I helped them move, and all this has benefited me in understanding the exact date.

Q. What is the exact date that you left Modesto to come to Los Angeles?

[fol. 235] A. It would be the 7th.

Q. Of what?

A. Of February.

Q. Of what year?

A. 1955?

Q. Suppose you tell us the events that led up to the date February 7th that will enable the Jury to know the basis on which you calculate the date?

A. Well, it was the last religious meeting that I had attended at the Modesto congregation, for one. My friends had a farewell get-together for me Sunday evening after the meeting. And then Mr. Biel and I had made specific arrangements for him to pick me up to go to Los Angeles on the following Monday, because he was coming back from San Francisco driving his truck, and then he picked me up Monday.

Q. At about what time was it that you left Modesto for Los Angeles on the 7th of February?

A. It was in the evening.

Q. Could you approximate the time?

A. I would say approximately 9:00 o'clock in the evening.

Q. And when did you arrive in the truck here or rather up in Los Angeles?

A. It was the following morning.

Q. About what time?

A. It was about ten hours later, because we had to sleep [fol. 236] for a couple of hours in the truck.

Q. What sort of truck was Mr. Biel driving and what type of hauling was he doing and for whom, tell me if you know?

A. It was a large semi, and he was hauling pickles for Ladies Choice Foods.

Q. When you say "semi" you mean it is a tractor and truck?

A. Tractor and a trailer.

Q. With a long trailer, is that correct? And where did you wind up with the truck in Los Angeles?

A. At the Truck Terminal.

Q. Where was that?

A. I don't remember the street. It was downtown Los Angeles.

Q. At what concern—what business?

—A. It was a large Trucking Business where different trucks would come in and out, and this individual who was contracting for different companies had Mr. Biel drive his truck, and we drove in there.

Q. Was that a common Truck Terminal where other Truckers came in, in Los Angeles?

A. Yes.

Q. Was it downtown, you said?

A. Downtown Los Angeles.

Q. What day was it that you arrived in Los Angeles? [fol. 237] A. That was Tuesday.

Q. And knowing Tuesday and having identified the date you left Modesto, what day of the month was it?

A. The day of the month?

Q. Yes. You said you left on the 7th. It was the next day, the 8th, wasn't it?

A. Yes.

Q. All right, you got into Los Angeles on the 8th. And where did you go after you got into Los Angeles on the 8th?

A. Well, Mr. Biel and I went over to his home, to his apartment. He had an apartment up there on 2012 West Sixth Street.

Q. And what address did you establish after leaving Modesto? And when I say "address" I mean place of residence. Where did you live after leaving Modesto?

A. 2012 West Sixth Street.

Q. Was that in the apartment occupied by Mr. Biel?

A. Yes sir.

Q. The 2 of you had planned to work together in the logging business; is that right?

A. Yes.

Q. Or the tree cutting business in the Los Angeles area?

A. Yes sir.

Q. How long did you work in the tree cutting business [fol. 238] in Los Angeles? How soon, may I ask, after arriving in Los Angeles did you begin the tree cutting business?

A. During that week, the same week that we arrived.

Q. You have mentioned about your parents moving here in San Diego. Did you have anything to do with that?

A. Yes sir.

Q. And have you been able to calculate the date that they moved?

A. Yes.

Q. And when was that?

A. The date they moved was February 19th and 20th.

Q. Have you verified that since Friday?

A. Yes I have. I checked with the Gas and Electric Company and they informed me of the date of the electricity being turned off.

Q. What time was it or what day of the week was it that this movement or your assistance of their moving from one address to another in San Diego took place?

A. It was on a week-end, Saturday and Sunday.

Q. And after helping them move, what did you do?

A. Well, after I helped them move I went back to Los Angeles.

Q. And at Los Angeles what did you do after arriving back in Los Angeles?

A. Mr. Biel and I began work again the following Mon- [fol. 239] day and then the Tuesday after that, I helped them move, we went to the Post Office.

Q. And then you did the mailing you have already told the Jury about last Friday; is that correct?

A. Yes sir.

Q. You have told us, in response to one question I put to you a few minutes ago, that had the F.B.I. man notified you that it was necessary that you should report on that day you would have proceeded on, is that correct, tried to get to the Board?

A. I would have tried to, but I couldn't have because of the time element.

Q. What is the distance between San Diego and Santa Monica, if you know?

A. Approximately 145 miles, 140 miles.

Q. If you ever had an opportunity to comply with the Order to Report, would you have reported?

A. Yes sir.

Q. For what purpose or why would you have done it and what would you have done?

A. I would have done all the things necessary up to the point of induction, because that way I would be able to receive a classification of 4-D.

Q. How did you know that it is necessary for you to go down to the end-of-the-line, as they call it?

[fol. 240] A. I knew that, an attorney told me previously.

Q. Was that in connection with your other case?

A. Yes sir.

Q. And who was the attorney?

A. Mr. Harold Shire.

Q. Where did he have his office?

A. In Beverly Hills.

The Court: The witness said it would have been in order to get a 4 D Classification.

Mr. Covington: Yes, that is a mistake.

The Court: Let us not have any misunderstanding.

Mr. Covington: Yes.

The Court: By completing the administrative process he would have been able to have contested—

Mr. Covington: Or had the Court review the administrative proceedings of the Draft Board.

The Court: Yes.

By Mr. Covington:

Q. You knew that was necessary, as the Judge has stated it, did you not?

A. Yes sir.

Q. And you learned that from Mr. Shire, your lawyer, in the first case in Los Angeles; is that right?

A. Yes sir.

Mr. Covington: That is all, your Honor.

[fol. 241] Cross examination.

By Mr. Hornbaker:

Q. Mr. Venus, how old are you now?
A. 30 years of age.
Q. And when did you first register for the Draft?
A. In 1948.
Q. How old were you then?
A. 18.
Q. Did you claim to be a Conscientious Objector when you first registered for the Draft?
A. No sir.
Q. Did you receive a 1-A Classification in the Spring of 1950?
A. Yes sir.
Q. Did you receive that Classification at 184 National Avenue, Chula Vista, California?
A. Yes sir.
Q. Was that the last address which you had given to your Local Board?
A. Yes, that was my home address, my parents' address.
Q. Did you get married in the Spring of 1950?
A. Yes sir.
Q. To whom?
A. To Joanne Norlander.
Q. Are you still married to her?
[fol. 242] A. No sir.
Q. Were you divorced?
A. Yes sir.
Q. When were you divorced?
A. 1951. It was final in 1952.
Q. Did you give any written notification to your Draft Board that you had been divorced?
A. No sir.
Q. Did you receive a 3-A dependency classification in 1950 after you got married?
A. Yes sir.
Q. Did you receive that Classification at 949 Highland Avenue in National City, California?
A. Yes sir.

Q. Was that the last address which you had given your Local Board?

A. Yes sir.

Q. Did the Local Board find out about your divorce?

A. Yes sir.

Q. Did you get a second 1-A Classification in November, 1951?

A. Yes sir.

Q. Was that after the Draft Board found out about your divorce?

A. I don't know that, sir.

[fol. 243] Q. Did you receive that second 1-A Classification at 4591 Point Loma in San Diego, California?

A. Yes sir.

Q. Was that the last address which you had supplied to your Local Board?

A. Yes sir.

Q. Did you ask for a Conscientious Objector Form after you got your 1-A Classification in November, 1951?

A. Yes sir.

Q. And how soon after you got that 1-A Classification did you ask for your Conscientious Objector Form?

A. I believe it was immediately, because I had just become an ordained minister about a week previous to that.

Q. Did you become an ordained minister before or after you received the second 1-A Classification?

A. Before, sir.

Q. And how much before?

A. About a week.

Q. This was the first time that you had asked for a Conscientious Objector Form, wasn't it?

A. Yes sir.

Q. Did you go to work for Martinolich Shipbuilding in January, 1952?

A. Yes sir.

Q. What kind of work did you do there?

[fol. 244] A. We were working on Minesweepers and a few boats, different boats, different types of boats.

Q. Did you take that job to stay out of the Draft?

A. No sir.

Q. Did you get a 2-A Occupational Classification in February, 1952 shortly after you went to work for the shipbuilding company?

A. Yes sir.

Q. Did you quit the shipbuilding company in June, 1952?

A. I believe so.

Q. What did you do then?

A. In 1952?

Q. Did you go to work for National Steel and Shipbuilding?

A. Yes sir.

Q. What kind of work did you do there?

A. I was a carpenter's helper.

Q. And what were you working on?

A. Boats.

Q. What kind of boats?

A. At this time I believe it was the same type of construction as the other Corporation.

Q. Did you work on submarines?

A. No, not that I recall.

Q. What sort of boats did you work on?

A. I think they were mine-sweepers.

[fol. 245] Q. You notified the Local Board of your change in work status from Martinolich to National Steel and Shipbuilding immediately, didn't you?

A. Yes, sir. I was told to do that.

Q. Did you receive a third 1-A Classification later in January, 1953?

A. Yes, sir.

Q. And did you receive that at 650 Eleventh Street in San Diego?

A. Yes.

Q. Was that the last address you had supplied for your Local Board?

A. Yes sir.

Q. Did you immediately mail a Notice of Appeal from that Classification?

A. Yes sir.

Q. Did you receive a notice that the Appeal Board had affirmed that 1-A Classification in April, 1954?

A. Yes sir.

Q. Did you receive an Order to Report for Induction in May, 1954?

A. Yes sir.

Q. Where did that Order direct you to report for induction?

A. Where did it?

[fol. 246] Q. Yes.

A. Down in San Diego.

Q. Do you remember where in San Diego?

A. Yes, at the Greyhound Bus Depot.

Q. Did you go to the Greyhound Bus Depot?

A. Yes sir.

Q. Where did you go from there?

A. To Los Angeles.

Q. What happened when you got to Los Angeles?

A. We had a complete mental and physical examination and then different men were sworn in and a Captain at that time said, "Is there anyone who is conscientiously opposed?"

And I said, "Yes sir, I am."

He said, "On what grounds?"

I said, "On the grounds of being a minister."

He said, "What religion?"

I said, "Jehovah's Witnesses."

He said, "Will you step this way?" and he had me sign my name to a piece of paper in the same connection.

Q. What did the other men do?

A. I believe that they were classified and went in.

Q. Did they take one step forward?

A. Yes sir.

Q. Weren't they told before they took the one step forward that after they took the step forward they would [fol. 247] then be in the Army?

A. Yes sir.

Q. And you refused to take that step forward?

A. I did sir.

Q. Did you know at this time that if you reported but refused to be inducted that you could then reserve any legal defenses you might have in a Court Trial?

A. I was not aware of it at that time sir.

Q. When did you first find that out?

A. I found that out around November of 1954 from Mr. Shire, because he had become my attorney at that time. I didn't have an attorney until then.

Q. Did you want to join the Army in May, 1954?

A. No sir.

Q. Do you want to go in the Army now?

A. No sir.

Q. Have you ever wanted to go into the Military Service?

A. Yes sir.

Q. When was that?

A. This was when I was in High School. I was thinking of joining the Air Corps.

Q. Have you ever wanted to go into the Military Service since then?

A. No sir.

Q. Did you move to Modesto in June, 1954?

[fol. 248] A. Yes sir.

Q. Did you mail a notice to your Local Board which is dated June 7, 1954, stating that your address had been changed to 1431 Tenth Street, Modesto, California?

A. Yes sir.

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[fol. 249] By Mr. Hornbaker:

Q. The last sentence of that reads: "My new address is 1431 Tenth Street, Modesto, California, but can be reached within one or two days at my San Diego address." How many previous San Diego addresses have you given to your Local Board?

A. I think three, sir.

Q. And what were those three?

A. Well, two of them were of my parents, and the other one was my personal address where my ex-wife was living and her folks.

Q. Was one of those addresses 4591 Point Loma in San Diego?

A. Yes, that was my ex-wife's address.

Q. And was one of those addresses 3175 Cedar Street in San Diego?

[fol. 250] A. Yes sir.

Q. And was one of those addresses 650 Eleventh St. in San Diego?

A. Yes sir.

Q. Which one of those San Diego addresses did you have reference to in your letter of June 7, 1954?

A. The one that was on the envelope, 650 Eleventh St., my parents' home address.

Q. Did you ever tell Mrs. Haisch that that was the address which you were referring to in your letter of June 7, 1954?

A. Yes sir.

Q. When did you tell her that?

A. On my visit at the Board.

Q. What date?

A. In April, 1957.

Q. But you hadn't told her prior to April, 1957?

A. I thought you were referring to something in a later analogy. I am sorry. I misunderstood your question.

Q. Had you told her that when you used the term "my San Diego address" in your letter of June 7, 1954 that you meant the Eleventh Street address at any time prior to June, 1956?

A. Yes sir.

Q. When did you tell her that?

[fol. 251] A. I believe that it was at a hearing that I had before the Board, sir, because you see I used my parents' address a couple of times there.

Q. When was this hearing?

A. I am not familiar with it. I would have to check the file.

Q. Were you living at 4591 Point Loma at any time on or after October 28, 1955?

A. Oh, no sir.

Q. Were you living at 3175 Cedar Street in San Diego on or after October 28, 1955?

A. No sir.

Q. How long did you live at 1431 Tenth Street in Modesto?

A. From June, 1954 to February 7, 1955.

Q. Did you receive any mail at that Modesto address?

A. Yes sir.

Q. What kind of mail did you receive?

A. I received mail from my parents, I received mail from my brother, I received mail from an individual friend by name of Manuel Drum and from the Watch Tower Bible and Tract Society in New York.

Q. How many pieces of mail do you estimate you received while you were staying at 1431 Tenth Street in Modesto?

A. I don't remember, sir.

[fol. 252] Q. Do you have any estimate? Did you receive a letter a day?

A. No, not that many.

Q. Did you receive a letter a week?

A. I believe that I received one every other week.

Q. Did you have any friends or acquaintances in Modesto?

A. Yes sir.

Q. Who were those people?

A. Jehovah's Witnesses.

Q. What were their names?

A. Well, Helge Peterson, Manuel Gallegos,—I can name several if you like.

Q. Would you go ahead and name them?

A. Yes. Wanda McManis, Bill McManis, Benny Norris, Reginald Hartley and Mrs. Hartley, his wife, Doug Hartley and his wife, Lawrence Sousa and his brother (I forgot his name) and his mother and father, also Caroline June Ferry.

Q. Did any of those people live at 1431 Tenth Street?

A. No sir.

Q. When did you leave Modesto?

A. I left Modesto on February 7, 1955.

Q. And where did you go?

A. I went to 2012 West Sixth Street in Los Angeles.

Q. Did you leave any forwarding address with the Post Office in Modesto?

[fol. 253] A. No sir.

Q. Why didn't you leave a forwarding address?

A. Well, I didn't leave a forwarding address when I had gone to Modesto because everyone knew of my address as far as San Diego is concerned being my parents' home address. All the important and essential mail was to come to

them. I knew that the Board had my address, the 650 Eleventh Street address. I knew that the other friends of mine, including the Watch Tower Bible and Tract Society, had that address. And I knew that anything that was of importance would go to that address, to 650 Eleventh Street.

Q. So all of your friends knew of your San Diego address at the time you left Modesto?

A. I wouldn't say every single one of them, sir.

Q. Most of them knew of your San Diego address?

A. Not most of them, sir.

Q. Did half of them know?

A. I have hundreds of friends in Modesto. I didn't go to each and every one. The employer, Mr. Morrison, knew. He knew my San Diego address because he had sent a food supplement to that address and he had written me several times at that address before I had moved up to Modesto and he knew I was going back to Los Angeles and he had that address. That was the address that he had last.

Q. Did you ask any of these friends to forward your mail [fol. 254] to you from Modesto?

A. I told Mr. Morrison, I had instructed him to send any mail to 650 Eleventh Street, the address of my parents.

Q. Didn't you ask anybody else to pick up your mail at a later date?

A. No sir, because Mr. Morrison had access to the building, he had a key and he was my employer, he was the one who had the building itself.

Q. You didn't ask any of these other people to pick up mail at the Post Office and forward it to you?

A. No sir, there was no forwarding address. I didn't leave a forwarding address.

Q. Mr. McManis sent some mail to you from Modesto after you left Modesto, didn't he?

A. Yes sir.

Q. What did he forward to you.

A. He forwarded the photostatic file, sir.

Q. That is, your Selective Service file, wasn't it?

A. Yes sir.

Q. Where was it that you mailed this change of address in February, 1955?

A. It was in the sub-station in Los Angeles.

Q. Where were you living at the time you mailed this change of address?

A. I was living at 2012 West Sixth Street.

[fol. 255] Q. So that while you were living in Los Angeles you sent this card to your Local Board telling them your address had been changed from Modesto to San Diego?

A. Yes sir.

Q. How did you send that June, 1954 change of address?

A. I believe it was Registered Letter, sir.

Q. Why didn't you send this February 1955 one by Registered Letter?

A. It was a post-card, and I was not in the process of registering cards to the Board—in fact, to any one.

Q. Did you live anywhere else in Los Angeles other than this 2012 West Sixth Street?

A. Yes sir.

Q. How long did you live at 2012 West Sixth Street?

A. Approximately two and a half months, sir.

Q. About when did you move from that address?

A. Two and a half months after February 8th.

Q. So that would be about the middle of April?

A. Yes sir.

Q. 1955. Where did you move to then?

A. I stayed at the Del Mar Hotel—no, before that I went on the corner of Washington and Venice with Mr. Beil. We had rented a place there for tree work and it happened to have a house on it, a little place to live.

Q. Was that 1482 West Washington Blvd. in Venice?

[fol. 256] A. Yes sir.

Q. How long did you live there?

A. One month, sir.

Q. So you left there about the middle of April?

A. Yes sir.

Q. I'm sorry, middle of May, 1955?

A. May, 1955, I believe.

Q. Where did you move to then?

A. Stayed at the Del Mar Hotel for about a week, and then I took up residence at 513 Grand and I was there for a month.

Q. When did you leave the 513 Grand address?

A. Well, it was in the summertime. Then I moved to 2006 Strawns Drive.

Q. How long did you live at 2006 Strawns Drive?

A. From the summer of 1955 until the time I was married the second time to Sandra Hughes.

Q. When was that?

A. When I was married, sir?

Q. Yes.

A. December 31, 1955.

The Court: I thought you said that you lived at this Strawns Drive from December, 1955?

The Witness: No sir.

The Court: What date in 1955?

[fol. 257] The Witness: It was in the summertime of 1955 until December the 31st.

By Mr. Hornbaker:

Q. You were not just moving around to avoid an Induction Notice, were you?

A. No sir.

Q. Did you notify your Local Board of any of these changes of address?

A. No sir, I didn't deem it necessary at this time.

Q. Do you know that you are supposed to keep your Local Board informed of the address where mail will reach you?

A. Yes sir. I did that, sir.

Q. How long have you known that, that you were supposed to keep the Local Board so informed?

A. I believe I have known that ever since I have been a Registrant.

Q. When did you first know that you had been ordered to report for induction on November 8, 1955?

A. I knew that—I actually knew it in April, 1957.

The Court: 1957?

The Witness: Yes sir, your Honor. But I assumed that it was true in 1956 when the F.B.I. Agent contacted me.

By Mr. Hornbaker:

Q. Did you report for induction after the F.B.I. Agent talked to you?

[fol. 258] A. No sir.

Q. You testified last Friday that Mr. Weeks told you that it was too late to report, didn't you?

A. Yes sir.

Q. You didn't give that testimony at the prior trial, did you?

A. No sir.

Q. Mr. Weeks was present and in the Courtroom at that trial, wasn't he?

A. I didn't know he was at that time, sir.

Q. You didn't recognize Mr. Weeks at the last trial?

A. No sir.

* * * * * * *

[fol. 259] Q. Did you talk to anybody in the United States Attorneys Office?

A. I wrote a letter after April, 1956 to the United States Attorney, but I didn't talk to the United States Attorney.

Q. Did you write any letter to the United States Attorney within two months after the time that Mr. Weeks talked to you?

A. No sir. He didn't suggest that, sir.

Mr. Hornbaker: I have no further questions, your Honor.

Redirect examination.

By Mr. Covington:

Q. You were asked about your divorce from your first [fol. 260] wife. Who got the divorce?

A. I did, sir.

Q. It is brought out also that you had a 3-A Classification because of the law that allowed you to have it because of your marriage, I believe, to your first wife. Dependency, was it? Was it your marriage to your wife or was it your father that got you—

A. No, it was because of my father; he was suffering from a strangling hernia at the time and he needed support.

Q. So it was not the marriage then that brought about the 3-A; is that it?

A. That is correct sir.

Q. How long were you an ordained minister before you got that 1-A that has been inquired of you by Mr. Hornbaker?

A. Well—

Q. You were a minister how long before you notified the Board or got the 1-A Classification that he inquired about?

A. You mean the first 1-A?

The Court: You asked two questions in one, Mr. Covington.

Mr. Covington: In November, I think it was.

Mr. Hornbaker: November 7, 1951.

Mr. Covington: The papers show Classification on September 24, 1952, and then again on January 7, 1953.

Mr. Barwick: November, 1951.

By Mr. Covington:

[fol. 261] Q. Yes, on November 8, 1951 you received a 1-A, and it was after that that you filed a Conscientious Objector Form on November 19. Had you been a minister before November 8, 1951?

A. Yes sir.

Q. When you filed that Conscientious Objector Claim or Classification Questionnaire on November 19, 1951 did you advise the Board of your having changed your mental status or mental attitude toward Military Service?

A. Yes sir, I did.

Q. Mr. Hornbaker asked you about the change of address notice that you gave when you came down to Los Angeles. I would like to ask you whether you notified them of the change from Modesto or a change of your San Diego address?

A. I told them that my new address was 1120 Thirtieth Street, and I told them that I could be reached here because this was the address of my parents.

The Court: You told them by the letter you mean?

The Witness: By the card that I mailed, your Honor.

By Mr. Covington:

Q. When was it that you moved away from Point Loma, approximately, if you remember?

A. I don't know.

Q. Do you remember when it was you left Cedar Street or moved from there?

[fol. 262] A. Yes. I think that was in the fall of 1953.

Q. Mr. Hornbaker inquired of you about the photostatic copy of your Draft Board file that was prepared during your first prosecution being forwarded to you by Mr. McManis from Modesto. How did the file get into his possession? Did he get it out of your Modesto address?

A. No, I wrote to Sacramento and told them to send it to 545 High Street, that was his address, because I knew that I was going to be up at my parents about a week because I had to go to Court in Los Angeles and I wanted to visit my parents, and so I did that, and then he forwarded the photostatic file to me.

Q. You had the State Director in Sacramento send it to Mr. McManis then in Modesto?

A. Yes sir.

Q. Because you knew you were going to need it in the trial or expected trial in Los Angeles; is that it?

A. Yes sir.

Q. Where was the file sent, to Los Angeles or San Diego?

A. It was sent to the San Diego address.

Q. Your parents' address, is that it?

A. Yes sir.

The Court: Sent by Mr. McManis to your parents' address in San Diego?

The Witness: Yes.

[fol. 263] The Court: Why did you have the Board mail the file to Mr. McManis at Modesto when you knew you were going to Los Angeles?

The Witness: Because I wanted to get hold of it as soon as possible, because I didn't know when I was going to need it.

The Court: Where did you think Mr. McManis would send the file to?

The Witness: I knew he would send it to my parents, because I had given him the address before I went up to Los Angeles.

The Court: Why didn't you have the Board send the file to your parents' address?

The Witness: I went to the Board and asked them what the address was, and they said they couldn't do it—this was in January, 1955, and they told me to write to Sacramento, and that is what I did.

The Court: They told you they couldn't send the file any place you specified?

The Witness: No, they said I would have to write to Sacramento.

Mr. Covington: In this matter of getting photostatic copies, the Board does not provide them. It is the State Director who provides them in Sacramento.

The Court: But you told the State Director's office where to send the file?

[fol. 264] The Witness: Yes.

The Court: Boy, I still don't understand why you had the State Director send the file to Modesto, knowing that Mr. McManis would forward it to San Diego. Why didn't you have the State Director's Office send it direct to San Diego?

The Witness: I don't know. I sent to them and I just didn't think at the time. It was because I wanted to get hold of it. That was the main reason.

By Mr. Covington:

Q. As a matter of fact, were you not still living at Modesto at the time?

A. Yes.

Q. And your home was still at Modesto?

A. Yes.

Q. Notwithstanding you were using your parents' address; is that right?

A. That is correct.

Q. Did you tell us that you made frequent returns from Modesto down to Los Angeles during this interval of time that the Draft Board file photostat was requested?

A. Yes.

Q. And for what purpose were you making these trips between Modesto and Los Angeles?

A. Well, the arraignment was postponed from time to time.

[fol. 265] Q. Mr. Hornbaker inquired of you about your Los Angeles address, 2012 West Sixth, and then the Washington Blvd. and Venice Avenue address and the Del Mar Hotel and 513 Grand and 2006 Strawn Drive. May I ask whether or not you were on bail at that time?

A. Yes, I was.

Q. Did the United States Attorney and the Marshal and the Government know your address during these times?

A. Yes sir, they did.

Q. Did you ever notify them of where you could be reached?

A. I notified the F.B.I. before I went to Modesto, and when I came back they knew it because I was in Court.

The Court: The question was, did you ever notify them of these other addresses?

The Witness: No sir, I did not, your Honor.

By Mr. Covington:

Q. How did the Government get in touch with you during this interval of time that you were out on bail when needed?

A. Through Mr. Shire.

Mr. Hornbaker: Your Honor, I object to this line of questioning. I think it is immaterial and irrelevant as to what went on between other branches of the Government and Mr. Venus. The relevant issue is what went on between the Draft Board and Mr. Venus.

[fol. 266] The Court: Overruled. He has answered the question. The answer may stand.

By Mr. Covington:

Q. Did you ever get any notices from the United States Marshal here in San Diego during that time?

A. Yes sir.

Q. Where did those notices go to?

A. Went to my parents' home address.

The Court: That is because your bond had your parents' address on it; is that right?

The Witness: Yes sir.

The Court: Your notices in connection with the Court proceedings go to the place listed on your bond, don't they?

The Witness: I believe so, sir.

The Court: My questions, ladies and gentlemen, don't indicate that I have any view one way or the other as to the ultimate decision in this matter. I am just trying to find out the facts as we go along and ask questions that you might ask.

Proceed.

By Mr Covington:

Q. Mr. Hornbaker asked you about the fact that at the last trial you did not mention about the F.B.I. Agent Mr. Weeks telling you at the time of the interview that it was too late to report according to that Order; is that correct?

[fol. 267] A. Yes sir.

Q. Do you know why it was that you didn't tell us about that at the last trial?

A. Well, because I was told not to talk too much, to epitomize everything, and I wanted to make it brief for the benefit of the Court and for the benefit of the Jury.

Q. Were you questioned about that either by me or by Mr. Hornbaker at the last trial?

A. No sir.

Q. Did we ask you that specifically?

A. No sir, not to my recollection.

The Court: Who asked you not to talk too much? The Judge or your own attorney?

The Witness: I believe it was the Court, your Honor.

The Court: The Judge who tried the case?

The Witness: Yes, your Honor.

Mr. Covington: That is all, your Honor.

Recross examination.

By Mr. Hornbaker:

Q. You didn't believe Mr. Weeks when he said it was too late to report, did you?

A. Yes sir, I did.

Q. Then why did you just testify that you would have gone down to San Diego and reported?

A. He didn't specify to do that, sir.

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[fol. 268] Edwin Beil, called as a witness on behalf of the defendant, being first duly sworn, on his oath was examined and testified as follows:

The Clerk: State your name please.

The Witness: Edwin Beil.

Direct examination.

By Mr. Covington:

Q. What is your present address, please?

A. Redway, California.

Q. Where is that in reference to Los Angeles or San Francisco?

A. It is about 230 miles north of San Francisco on Highway 101.

Q. Are you acquainted with Carlin Venus in this case?

A. Yes sir.

Q. Before I get to that, I will ask you whether or not [fol. 269] you are one of Jehovah's Witnesses and have ever been engaged in the ministry and also in other work with him previous to your coming here to the trial?

A. Yes, I am one of Jehovah's Witnesses, and I have worked with him in tree work.

Q. Have you ever worked with him in the ministry?

A. Yes, I have.

Q. Do you recollect any conversation between you and Mr. Venus in respect to going into business and his moving from Modesto down to Los Angeles and going into business

in the Los Angeles area, and when it took place, and just tell us what happened after the conversation between you, if any. Just tell it in sequence as it occurred, what was said, and then what was done in respect to the conversation.

A. You mean when I first met him?

Q. After you first met him you had a conversation with him, didn't you, about moving? Is that correct?

A. Yes. I met him in December, 1955—1954. That was when I was living at 2012 West Sixth in Los Angeles. I am a redwood follower up north, and at that time I intended to go into the tree business in the Los Angeles area and I wanted a partner, and he looked like he would be pretty good for that kind of work. So I talked to him about going in with me if I could line up some tree work, because at that time I was hauling from Los Angeles to San Francisco.

[fol. 270] Q. Let's not get away from that. You were hauling from Los Angeles to San Francisco and return. What sort of work were you doing when you say "hauling"? What were you doing and for whom?

A. Well, I was working as driving Earl Sharp's truck. He was under contract to Ladies Choice Foods. We hauled wholesale groceries from Los Angeles to San Francisco, and we would haul pickles from Hayward to Los Angeles for Ladies Choice.

Q. [illegible] you doing that in the fall and winter of 1954 and [illegible]rly months of January and February, 1955?

A. [illegible]p until the first week in February.

Q. [illegible] get back to the conversation. And you found out that he was all right for this tree cutting work, and you agreed to go into business. Just what was done between the 2 of you in respect to his moving from Modesto down to Los Angeles, and when it was, and how you know about the date?

A. Well, my employer knew all along that I had my falling equipment down there and intended to go into the tree business and that I was just looking for enough work to be able to quit the driving job and have steady work in the tree business.

I had talked over with Carlin when we could start in on it. In January I arranged for a job that amounted to be-

tween $2000 and $3000 dollars. We figured that that was a good enough job to start in on. And by the time it was [fol. 271] finished we had plenty more work from the same General Contractor we were doing that job for. So we arranged for him to move down in the first part of February, because this job I had lined up was to start about the middle of February.

So at that time I was still driving truck. So I arranged to take him up to Modesto, because he was living in Modesto then, so he could pack his things and he would move down on my way back from San Francisco.

Q. Did you take him on one of the drives for your employer, the trucker?

A. Yes.

Q. And when you took him up you were on your way to San Francisco?

A. Yes sir, that is right.

Q. I am sure the Jury knows, but maybe not all exactly. What is the distance from Los Angeles to Modesto, approximately?

A. About 350.

Q. And from Modesto to San Francisco?

A. About 95 to where I was unloading.

Q. Tell us about the trip to San Francisco and the return trip to Los Angeles and what, if anything, you did in connection with Mr. Venus about his moving down to Los Angeles?

A. Well, on the way to San Francisco we left about, oh, around 10:00 or 11:00 in the morning, it was on a Sunday morning, the first Sunday in February, which was the last [fol. 272] trip I made. So that evening as we were going through Modesto I stopped at a station and left him off and went on to San Francisco. And on the way up we had made arrangements that he would have everything ready, because I was on schedule and I had to be back in Los Angeles Tuesday morning at 8:00 o'clock to unload. So he had to be ready Monday night so we wouldn't be late.

Q. You went to San Francisco and returned back toward Los Angeles and passing through Modesto what, if anything, did you do? What happened?

A. Well, when I got back to Modesto, I stopped on the highway. I couldn't get the truck off the highway. It was too long, wide and heavy for the street. So I just parked on the highway and went to a Service Station. He had given me Mr. McManis' 'phone number so I called Mr. McManis to bring Carlin and his luggage down to the highway so that he could go on to Los Angeles in the truck.

The Court: You place this about February 1st?

The Witness: No, it was the first week-end in February. I quit my driving job about the end of the first week. I worked the first week of February hauling.

By Mr. Covington:

Q. So it was on February 7th, Monday night, that you stopped in Modesto to pick him up; is that right?

A. That probably was the 7th. It was the first Monday [fol. 273] in February.

Q. Did you pick him up? Did Mr. McManis bring him to the truck?

A. Yes, he did.

Q. And then what did he have with him?

A. He just had his suitcases, one large and one small, and his little brief case.

Q. And then what happened?

A. I took him on to Los Angeles to the Terminal where I was unloading, which was at Ladies Choice Foods.

Q. Where was the Terminal located?

A. In Los Angeles on the East Side.

Q. What part of Los Angeles?

A. You go out the Harbor Freeway and take the—I forget the name of the turnoff now, this is about 5 years ago, I quit there—about 3 miles East of Los Angeles; Villa something or Costa something—I don't remember the name of the turnoff off of the Freeway.

Q. You got to the Terminal and then what did you do when your business terminated with the Trucker?

A. As the Trucker already knew for nearly a month, that would be my last trip. So I kept my car at the Terminal, and so we loaded his baggage into my car and drove to 2012 West Sixth Street.

Q. Did you have an apartment in downtown Los Angeles?

[fol. 274] A. I guess you would call it downtown. It was quite a ways west, between the downtown area and Venice, near the downtown area.

Q. Did you arrange for Mr. Venus to live with you in your apartment?

A. Yes, we had already arranged that a month or so before.

Q. And then what happened after that? You got to the apartment. This was on a Tuesday morning.

A. Tuesday morning.

Q. Then, what happened?

A. Well, it was the latter part of that week we started a tree job on El Segundo Blvd. between Western and Crenshaw. The fellow we were sub-contracting from had the prime contract to widen El Segundo Blvd.

The Court: Let's skip all this and get down to what you're interested in.

Mr. Covington: All right, your Honor.

By Mr. Covington:

Q. He did work with you in the tree business during that week; isn't that right?

A. Yes.

Q. And later did he leave and go down to San Diego?

A. Not before we started, no.

Q. I mean after this job started?

[fol. 275] A. Well, after we worked about a week or so, he just went down over a week-end—he wasn't gone on working days—to help his parents move.

Q. On his return from San Diego do you know whether he had occasion to go to the Post Office and, if so, were you with him?

A. Yes.

Q. Tell us about that, when it was and how it happened and just what occurred?

A. Well, when he got back from when he moved his parents in San Diego, which was the second week-end, then

we went to work that next day and we broke either an axe or sledge handle, so we had to take off to get a new handle and some saw parts anyhow. So we arranged to take that day to go to the Post Office and send his change of address to the Draft Board, and the Money Order to an elderly woman that he knew here in San Diego that he knew was badly in need of some money.

Q. Did you go along with him?

A. Yes. We went either on the way to the saw shop to get the parts.

Q. Tell us about that?

A. We lived at 2012 West Sixth Street, which was only half a block from Alvarado, and the Post Office was on Alvarado. You go half a block west and half a block north and rado. You go half a block west and half a block north and it is on the east side of Alvarado, the sub-station there. We [fol. 276] went there first. We just walked there and I went in the Post Office with him and saw he got this stamped envelope to send the Money Order in and this post-card to send his change of address with, and then he wrote them out there at the desk in the Post Office.

Q. Was it a Government post-card and a Government envelope stamped?

A. Yes, the envelope was already stamped, and the post-card was.

Q. I mean at the Post Office window, is that right?

A. Yes. He didn't have it with him.

Q. Did you see him write them out? Did you see what he did?

A. Oh yes, I watched him write them out. I didn't watch the words. I knew what they were for, but I didn't watch the words to see what he was writing.

Q. When he got through writing on the card and on the envelope, did you see him do anything with the envelope or the Money Order?

A. Yes. He put the Money Order in the envelope, and he put both the envelope and the post-card in the Mail Slot in the Post Office.

Mr. Covington: That's all.

Cross examination.

By Mr. Hornbaker:

[fol. 277] Q. Mr. Beil, did you see an address on this post-card?

A. I didn't make out the exact address. I saw there was an address on it. But I didn't know what it was. I saw where he got the address he put on it when he pulled out his billfold and looked at his Draft Board—

Q. So you don't know of your own knowledge what address was on that post-card, do you?

A. No, not from actually reading it, no.

Q. All you know is what Mr. Venus told you?

A. Yes, and by the card he looked at to get the address.

Q. Did you see the card he looked at?

A. I saw that it was his Draft Board Card. I didn't read the address on it.

Q. Did you see what was on the other side of this post-card?

A. No, I saw him writing on it, but I didn't see what he wrote. I didn't watch the words as he wrote them.

Q. So that you don't know whether there was a post-office address on the other side of that card or not, do you?

A. I couldn't swear there was.

Mr. Hornbaker: I have no further questions, your Honor.

Mr. Covington: That is all. Thank you.

The Court: Step down.

William L. McManis, called as a witness on behalf of [fol. 278] the defendant, being first duly sworn, on his oath was examined and testified as follows:

The Clerk: State your name please.

The Witness: William L. McManis.

Direct examination.

By Mr. Covington:

Q. Mr. McManis, where do you reside at present?

A. 121 South Second Street, Estherville, Iowa.

Q. What is your occupation?

A. I am a presiding minister of the local Spirit Lake Congregation there.

Q. You were subpoenaed by the defendant to come here; is that correct?

A. Yes it is.

Q. And your transportation was paid; is that correct?

A. Yes it was.

Q. You have testified on three previous occasions in this case, have you not?

A. Yes I have.

Q. I would like to ask you whether or not you were living in Modesto at the time that Mr. Venus lived in Modesto?

A. Yes I was.

Q. Do you recollect the period of time that he lived in Modesto, approximately?

A. Well, it was from the middle of the summer of 1954 to the first part of the year 1955.

[fol. 279] Q. Do you remember approximately the occasion of his departure from Modesto? When I say "departure" I mean the time that he moved his things from Modesto to some other place?

A. Yes I do.

Q. Tell us about that.

A. Well, Mr. Venus called me on a Sunday evening and he said that he had just arrived, he was on Highway 99 going through Modesto at this Filling Station there and he asked me to come and pick him up. And he had planned on attending the religious services there of the local Kingdom Hall that Sunday evening. And the meeting started at 7:00 o'clock with a public talk, so he wanted to clean up. He came to my house at 5:45 Iowa Street, and from there my wife and myself and Mr. Venus went there to the Kingdom Hall.

Q. And after the church meeting, what did the 3 of you do, or what happened?

A. Well, since he had told me that he was going to move from the address there, 1431 Tenth Street, we wanted to have a farewell gathering for him, a get-together and wish him well, etc., and we had that at my home there.

Q. When was that with respect to the—

A. That was Sunday evening after the meeting. That was about 9:30. The meeting was over at 9:00 o'clock.

Q. And was Mr. Venus there at your house that evening?

A. Yes, he was.

[fol. 280] Q. Where did he spend the evening Sunday night?

A. He spent it at my house.

Q. Did you have anything to do with him the next day with respect to his preparing to leave or taking any steps to leave Modesto?

A. Yes, since I was off work because of the rainy weather—the next day was a Monday—well, I had arranged to take him to the address 1431 Tenth Street and then pick him up after he had done his packing and then take him to my house and he was going to stay there to wait for a 'phone call from Mr. Beil when he came back through on his return trip from San Francisco.

Q. Did Mr. Beil come in on a Monday and pick Mr. Venus up, or just what happened?

A. Yes, just after we had finished eating supper about 6:30 or 7:00 o'clock, we got a 'phone call from him, from Mr. Beil, and he said that he was at a Service Station on Highway 99, which I was familiar with. So I took Mr. Venus and his bags, put them in the car, and drove down to the Highway leading out of Modesto, and he met Mr. Beil there and they continued on their way. That was about, oh, I suppose 8:00 o'clock, something like that.

Q. What did he take with him?

A. Well, he had all of his luggage that I know of, all his possessions. He moved completely out of there, to my [fol. 281] knowledge. He had 2 briefcases and a small briefcase that he brought with him. I suppose his Bible and literature was in it.

Q. You say 2 briefcases?

A. Well, large pieces of luggage.

Q. How long did you continue yourself to live in Modesto?

A. Until the latter part of May, 1955.

Q. Are you familiar with the building where Mr. Venus worked while he was there in Modesto, Mr. McManis?

A. Yes, I am.

Q. Tell the Jury about the building, what sort of building it was, whether it was brick or wood.

A. It was a large stucco building that sat on the corner of Tenth Street there in Modesto. It was used for a gymnasium. I am aware of that because when I had moved to Modesto I had contracted to do some work of remodeling in the building. I did carpenter work.

Q. Who leased the building and used the building at that time? During this period?

A. Harold Morrisson, Jr.

Q. What sort of business did he run there?

A. He ran a gymnasium for physical correction, therapy, and also he sold a food supplement on the side.

Q. How long did that building continue—or I will ask you this: Did you ever have occasion to pass by the build-
[fol. 282] ing while you were living there in Modesto after Mr. Venus left?

A. Yes. My wife worked at the California Employment Office there and it was right up the street, and as I would drive her to work I would let her off in front of the Employment Office and then I would pass by it almost each day, not every day, but almost each day as she was employed there, and so I had occasion to see the happenings that were going on around the building.

Q. Mr. Venus left in February. What happened to the building after that? Did his employer vacate the building or give up the lease or anything like that, as far as you know?

A. As far as I know, the building was vacated, at least there was no activity around that, from after March, 1955. The building was moved off the lot. It was moved and the foundation was demolished in the latter half of April, 1955.

Q. Did you see the building in the process of moving?

A. Yes, I did. I am familiar with the way they were blocking the building up and moved it, because I am familiar with the carpenter business, or have been.

Q. Did you see the building blocked up?

A. Yes, on the big 12 x 12 ties.

Q. What date was it, approximately, or what part of the month was it that the building was moved off and the foundation demolished?

A As close as I can approximate it from the calendar, [fol. 283] judging from my knowledge after I moved, it was around the 23rd or 24th of April, 1955.

Q. And when was it that you yourself left Modesto?

A. Around the 25th of May, 1955.

Q. After the foundation was demolished, what use was that lot put to where the building was?

A. It was put to use as a Parking Lot for used cars, sold used cars, and about half of the lot was incorporated into that business.

Q. Before the building was torn down, what business was adjacent to the gymnasium building?

A. A used car company.

Q. Was it a used car lot there adjacent to the building?

A. Yes.

Q. And when the building was removed and the foundation demolished and the ground leveled off, who took over the lot?

A. Well, the used car dealer right next door to it, because he had cars parked all through there.

Q. And after that what happened with that lot or area there?

A. It was used for used cars.

Q. And that lot or area then was integrated with the used car lot next door; is that it?

A. Yes.

Cross examination.

[fol. 284] By Mr. Hornbaker:

Q. Mr. McManis, are you opposed to Military Service for Mr. Venus?

A. That is a decision that he has to make, not me.

Q. Are you opposed to Military Service for anyone?

Mr. Covington: That is immaterial, your Honor. It certainly doesn't bear on credibility.

The Court: Sustained. You may inquire what Sect he is a member of, etc.

By Mr. Hornbaker:

Q. Are you conscientiously opposed to war?

Mr. Covington: That is objected to for the same reason; it doesn't bear on credibility.
The Court: Sustained.

By Mr. Hornbaker:

Q. Are you a member of Jehovah's Witnesses?

The Witness: Yes sir.
The Court: And you claim to be a minister, too?
The Witness: Yes sir.
The Court: How long have you been a minister?
The Witness: Since December, 1952.
The Court: How old are you now?
The Witness: I am 30.
Mr. Hornbaker: I have no further questions.
The Court: Step down.

[fol. 285] Redirect examination.

By Mr. Covington:

Q. You are the presiding minister of a fixed congregation, are you not?
A. Yes I am.
Q. You have a church, do you not?
A. Yes sir.

Mr. Covington: That is all.
The Court: How long have you had a church?
The Witness: Since February, 1959.
The Court: Thank you.
Mr. Covington: Just one question.
The Court: Come back.

By Mr. Covington:

Q. Prior to that, had you been engaged in the full time ministry as one of Jehovah's Witnesses?
A. Yes, I have.
Q. For what period of time?

A. Since February or December of 1957.

Q. When did you become one of Jehovah's Witnesses, become a minister of the organization?

A. December 20, 1952.

The Court: Which question are you answering, when you became a minister or when you became a member of Jehovah's Witnesses?

[fol. 286] The Witness: When I became a minister and member both.

Mr. Covington: Simultaneous.

The Court: It is true that all members of Jehovah's Witnesses claim to be ministers?

The Witness: Yes.

The Court: It is part of your religion that each person who is a member acts as a minister in preaching which you consider to be Gospel?

The Witness: Yes sir.

The Court: So when you became a member of Jehovah's Witnesses you automatically became a minister?

The Witness: Yes sir, by ordination through baptism.

The Court: All right.

By Mr. Covington:

Q. Did you ever serve in the Armed Forces of the United States?

A. Four years in the Navy.

The Court: Before 1952?

The Witness: Before 1952. I was discharged July 27, 1952.

Mr. Covington: That is all.

The Court: Is that the defendant's case?

Mr. Covington: Not yet, your Honor. We have more witnesses. May we have a recess? This is going a little faster than we expected. We need about five minutes.

The Court: It is time for our regular recess. How much [fol. 287] longer do you think you will be?

Mr. Covington: We have one witness that we didn't learn about on a very important matter that we subpoenaed to come in in the morning at 10:00 o'clock. He is from Los Angeles. It only came to our attention this morning

and we get the subpoena out, of course, but it has not been served yet. We called him on the telephone and he has agreed to come without taking the subpoena. We have one lady to put on, and then after that our offer of proof will be made, as I said before, on this other matter, we can do that, if it please the Court.

The Court: Do you have rebuttal?

Mr. Hornbaker: No, your Honor.

The Court: We will take our recess at this time.

Ladies and gentlemen, remember the admonition of the Court not to discuss this case among yourselves or with anyone else, not to let anyone discuss it with you, not to form or express any opinion on the guilt or innocence of the defendant until the case is submitted to you for your decision.

(Recess.)

(After the recess, the defendant present with his counsel, the Jury together with the alternate present in their proper places, the proceedings continued as follows:)

Mr. Covington: Bertha Leonard.

Bertha Leonard, Called as a witness in behalf of the [fol. 288] defendant, being first duly sworn, under oath was examined and testified as follows:

The Clerk: State your name please.

The Witness: Bertha Leonard.

Direct examination.

By Mr. Covington:

Q. Where do you live please?

A. 3894 Trias Street.

Q. Where were you living during, say, February, 1955?

A. Same address.

Q. Is that here in San Diego?

A. That is in Old Town.

Q. Do you know the defendant Carlin Venus?

A. I do.

Q. Are you a member of the same religious organization Jehovah's Witnesses?

A. I am.

Q. During 1955 were you acquainted with him as a member of the society of Jehovah's Witnesses, the Watch Tower Society?

A. Yes.

Q. Did you have occasion during the month of February to receive any mail from him?

A. I did.

Q. Tell the Jury what it was?

A. I don't remember the day, but it was in February, 1955. He sent me a Money Order from L.A., and it was to [fol. 289] pay for my medicine.

Q. How can you fix the month of February if you can't fix the day?

A. I know it was in the month of February, but I don't know what day because at that time my memory was pretty bad. I never paid any attention to the day, but I know it was in the month of February.

Q. How do you know it was the month of February, please, mam?

A. Well—

Q. Was there anything in connection with your illness that would enable you to identify—

A. Not exactly. Nothing only I was paying from $14.00 to $25.00 a bottle for pills, medicine, at that time, and I was under a doctor's care going once a week, and I know it was in February.

Q. Were you in need of money at the time?

A. I certainly was.

Q. And you did actually receive this Money Order. What was the amount of the Money Order?

A. $20.00.

Q. And was the letter post-marked from Los Angeles?

A. It was.

Mr. Covington: That is all.

Mr. Hornbaker: No cross examination.

[fol. 290] Mr. Covington: Mr. Venus, please, the father.

JOHN G. VENUS, called as a witness on behalf of the defendant, being first duly sworn, on his oath was examined and testified as follows:

The Clerk: State your name please.
The Witness: John G. Venus.
I can't hear very good, your Honor, please.

Direct examination.

By Mr. Covington:

Q. Are you hard of hearing?
A. Yes, hard of hearing, sir.
Q. Where do you live at the present time?
A. 756 Pier, Santa Monica.
Q. During the years 1954 and 1955 were you residing here in San Diego?
A. Yes sir.
Q. Do you remember what month it was in 1955 that you changed your address to 1431 or rather from 650 Eleventh St. to—
A. 1120 30th Street.
Q. When was that?
A. In the middle of February, between the middle and end of February.
Q. Did you have any assistance or help in moving from one address to the other?
[fol. 291] A. Yes sir, I had both my sons help me, Carlin Venus and John Venus, Jr.
Q. Where did Carlin come from? Was he living in San Diego at the time?
A. Well, part-time, yes. He came from Modesto.
Q. That was after he came from Modesto; is that right?
A. Yes.

The Court: He said he came from Modesto. Did he come from Modesto to help you move?
The Witness: He came from Modesto to help me move.
The Court: From Modesto?
The Witness: Yes.

By Mr. Covington:

Q. Then how do you know it was the middle of the month?

A. Well, I had to pay the rent. I remember very well when I moved out.

Q. And when you made the change of address did you leave a forwarding card with the Postal Department?

A. I beg your pardon. I didn't hear that.

Q. When you changed the address did you file a forwarding card with the Post Office Department?

A. Yes I did.

Q. When was that?

A. That was in February also. Of course, I had to get my Social Security Check, and I also went to the Post Office [fol. 292] and Social Security Office.

Q. On the same trip?

A. Yes sir.

Q. And that was in February; is that correct?

A. In February.

Mr. Covington: That's all.

Mr. Hornbaker: No cross examination.

The Court: Step down.

Mr. Covington: Your Honor, we have a subpoena out instanter for substitute Agent In Charge of the Federal Bureau of Investigation and he should be here any minute. But Mr. Hornbaker has been served with an identical subpoena.

The Court: Let's not go into that. You have no other evidence at this time to present to the Jury?

Mr. Covington: Not at this time, until the subpoena is answered. I can put Mr. Hornbaker on the Stand.

Will you take the Stand, Mr. Hornbaker?

The Court: Just a minute.

Mr. Covington: It is about a matter that I deem should go before the Jury.

The Court: We will decide whether it goes before the Jury, and if we decide it goes, it will go.

Mr. Covington: It is not the other matter that we discussed, your Honor, that we have heretofore discussed.

The Court: Some other matter?

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[fol. 293] (The Jury leave the Courtroom.)

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Mr. Hornbaker: Your Honor, I would be willing to stipulate that the interview with Mr. Weeks did take place on April 9th, 1956.

Mr. Covington: That is not satisfactory. I want the time stipulated.

The Court: At 3:30?

Mr. Hornbaker: Yes, I will stipulate that it took place [fol. 294] at 3:30.

Mr. Covington: Is that all? And also that portion of the Report that shows that he was advised by the Agent to communicate with his Local Board by correspondence.

Mr. Hornbaker: No, I will not stipulate to that. And I move to quash that subpoena on the ground that counsel is not entitled to receive that Report, under Title 18 Section 3500, until such time as Mr. Weeks has been called as a witness. Since he has not been called as a witness, counsel is not entitled to the Report.

Mr. Covington: I will ask that counsel stipulate that Mr. Weeks was present in the Court at the last hearing throughout and he heard the testimony of Mr. Venus. He was brought here at that time by the Government, and after such time and before this trial Mr. Weeks died and he cannot be subpoenaed as a witness because he is dead. Will you so stipulate, counsel?

Mr. Hornbaker: I will stipulate that Mr. Weeks was here at least during part of the trial. I don't know of my own knowledge that he was here during the entire trial, but I did see Mr. Weeks present in this Courtroom on at least one occasion when he spoke to me. I cannot stipulate as to what Mr. Weeks heard or what Mr. Weeks said. But I do know he was here on at least one occasion.

The Court: And that he is now dead?

Mr. Hornbaker: Yes, that he has since died.

* * * * * * *

[fol. 296] The Court: * * *

However, I will inform the Jury of the stipulation you have entered into that the F.B.I. Report does show that Mr. Venus was interviewed on April 9, 1956 at about 3:30 by Mr. Weeks. Is that agreeable?

Mr. Covington: Yes, that is satisfactory.

The Court: In fact, I don't think the Government makes any dispute about this. This is part of the Government's case that he was so interviewed on April 9th.

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[fol. 297] The Court: Counsel haven't submitted me their instructions yet.

Mr. Covington: That is correct, your Honor.

(The Jury returned into Court.)

The Court: The case on trial. The Jury present in their proper places, also the alternate. The defendant present with his counsel.

Ladies and gentlemen, Mr. Covington, representing the defendant, and Mr. Hornbaker have entered into a short stipulation, which I will state to you. When facts are stipulated to you accept those as being proven.

[fol. 298] It has been stipulated between counsel that Mr. Weeks, an Agent of the F.B.I., interviewed Mr. Venus on April 9, 1956 at about 3:30 P.M., and that Mr. Weeks is now dead.

Are you satisfied, counsel?

Mr. Covington: Yes, that is satisfactory, your Honor.

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The Court: I understood that you were satisfied that the following Exhibits were not pertinent and might be marked merely for identification.

Mr. Covington: The one of August 21st.

[fol. 299] The Court: Not all of them, but 1-B, 1-C, 1-D, 1-E, 1-F, 1-G, 1-I, 1-J and 1-L. You did make an offer of 1-K and 1-H, and I received 1-H in evidence. I excluded 1-K.

Mr. Covington: Yes, that is the one—

The Court: These Exhibits from 1-B through 1-M are in evidence or not, which the record shows without going over them again. It is stipulated that they are all parts of the Draft Board file, is that correct?

Mr. Covington: That is right.

Mr. Hornbaker: Yes, that is right.

The Court: What other showing do you want to make?

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[fol. 300] HELEN A. HAISCH, having been previously duly sworn, on her oath was examined and testified further as follows:

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[fol. 358]

San Diego, California, Wednesday, May 11, 1960, 9:30 A.M.

• • • • • • •

[fol. 369] Mr. Covington: We have no further evidence, your Honor.

The Court: Defendant rests?

[fol. 370] Mr. Covington: Defendant rests.

The Court: The Government rest?

Mr. Hornbaker: Yes, your Honor.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: We will have to settle instructions, gentlemen, before the argument can start.

(Another matter.)

The Court: We will adjourn to Chambers, and if counsel will come to Chambers we will go over the instructions.

Mr. Covington: Will it be necessary for the defendant to be present, your Honor. We don't request it.

The Court: He doesn't have to be present unless he wants to be.

Mr. Venus, do you want to be present?

The Defendant: It is not necessary, your Honor.

The Court: All right.

(Whereupon, the following proceedings were had in Chambers:)

The Court: In the Ninth Circuit, Mr. Covington, our Circuit has said that at a conference on instructions by stipulation it may be agreed that any objections that you make here may be incorporated by reference at the jurisdictional time. They have said that that is a proper procedure.

Mr. Covington: I don't object to that, your Honor.

The Court: We find it much more convenient to make objections to instructions as we go along and make a record [fol. 371] without having to do it at the jurisdictional time

after the Court has given them and you have to sort out a particular one and with reference to that particular instruction make your objection, etc.

Mr. Covington: Yes.

The Court: If it is agreeable with you, we will make a record of this conference on instructions and by stipulation you may incorporate your objections, if any, by reference at the jurisdictional time, plus any other objections that you may want to make.

Mr. Covington: That is all right with me, your Honor. And it will be understood that the rule that requires an exception to the charge for refusal to instruct as requested in request number so-and-so and so-and-so will be waived. As I understand it—if you will correct me, because I may be wrong—your Honor, as I understand it, the practice is that counsel first submit instructions to the Court in advance of argument and get ruling thereon so that counsel will be apprized of what issues are going to be permitted to be argued to the Jury, and then after the Court has given the charge it is the duty of counsel to except to the charge of the Court for any affirmative errors committed by the Court and also to except to the Court's charge because it fails to charge as requested in request number so-and-so and so-and-so.

The Court: That is right.

[fol. 372] • • •

[fol. 373] Mr. Hornbaker: Have all those subpoenas been placed in the Clerk's file?

Mr. Barwick: Yes, the Clerk has all the originals.

Mr. Covington: Have you got a set of your requested instructions?

Mr. Barwick: Yes.

Mr. Covington: You didn't get to make copies of these?

The Court: Incidentally, I see that this motion that you handed up to me earlier was never filed by the Clerk.

Mr. Covington: We can have it filed nunc pro tunc, can't we?

The Court: It will be filed nunc pro tunc as of today. It was at the opening of the trial, wasn't it?

Mr. Covington: Yes, we started last Thursday.

The Court: May 5th.

Mr. Covington: Was it last Thursday?

Mr. Barwick: Yes.

The Court: The notice of motion and the motion by defendant to dismiss the indictment was handed to me on the 5th and was then argued and ruled on, but I didn't hand it to you. So file it nunc pro tunc as of May 5th, Mr. Clerk.

Is that agreeable?

Mr. Covington: Yes sir, that is all right.

GOVERNMENT'S REQUESTED INSTRUCTIONS

The Court: Let's take up the Government's proposed instructions. I propose to give Number 1.

[fol. 374] Mr. Covington: Your Honor, here is one thing I want to call your attention to. That word "neglect" is such a vague and indefinite word that, in the absence of some definition or explanation to the Jury, it would allow them to speculate, and "neglect" has a whole multitude of meanings. While the Statute does make a requirement, "neglect" in one case means one thing and in another it means another thing.

Mr. Hornbaker: This is "knowingly neglect".

The Court: Yes, this is the Statute, and it is coupled with the word "knowingly," which requires specific intent. If that is an objection, it is overruled.

I propose to give Government's Number 1.

Mr. Covington: We except to that, your Honor, to the giving of Number 1, without some sort of modification so as to explain the word "neglect" and avoid any speculation on the part of the Jury as to what would constitute a violation of the Statute.

The Court: Let me say now, I am going to read the Statutes and Regulations that are given, but many of these instructions I try to give in layman's language and I don't follow the exact wording of some of these instructions. I try to give the substance of them, and if I don't go far enough, or if I say something out of line, tell me later and I will try to correct it.

Mr. Covington: But our stipulation about omissions still [fol. 375] applies, does it not? Say for instance, if you do not cover an instruction that has already been refused. I

mean our stipulation about the exception to the refusal to give as requested instruction number so-and-so—we don't have to repeat it at the end of the charge.

The Court: No. When I tell you that I am going to give a certain instruction, for instance, on an admission made by a defendant outside the Courtroom, I am going to give that. But suppose I said I'm going to refuse it, and you except to my refusal to give that instruction, when I don't give it the record is there and you incorporate the record and you have a record on it. If I say I am going to give that instruction and I neglect it, you call it to my attention. If I say I am going to give it and I don't give it in the language you think I ought to give it, then you call that to my attention.

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[fol. 397] Defendant's Requested Instructions

The Court: I propose to reject No. 45 as not adding anything to the other instructions given, as being cumbersome, unintelligible and various other objections.

Mr. Covington: We take exception to the ruling of the Court and ask the Court to give to the jury defendant's request No. 46 in the manner and the language requested.

The Court: Overruled.

• • • • • • •

[fol. 440] The Court: The written document handed to the Court by Mr. Covington as the grounds of his motion for the judgment of acquittal will be copied into the record at this time by the reporter, and Mr. Covington will also be given the opportunity, at the appropriate places here, to supplement his motion by matters which he will now state to the reporter.

(The document above referred to, together with the portions dictated to the reporter, is, in words and figures, as follows:)

Grounds of Motion for Judgment of Acquittal:

1. There is no evidence of guilt of the defendant as charged in the First Indictment.

2. The undisputed evidence shows that the defendant is not guilty as charged in the First Indictment.

[fol. 441] 3. The evidence is insufficient to support a verdict of guilty under the First Indictment.

4. The government has wholly failed to prove a prima facie case under the First Indictment.

5. There is no evidence of guilt of the defendant as charged in the First Count of the Second Indictment.

6. The undisputed evidence shows that the defendant is not guilty as charged in the First Count of the Second Indictment.

7. The evidence is insufficient to support a verdict of guilty under the First Count of the Second Indictment.

8. The government has wholly failed to prove a prima facie case under the First Count of the Second Indictment.

9. There is no evidence of guilt of the defendant as charged in the Second Count of the Second Indictment.

10. The undisputed evidence shows that the defendant is not guilty as charged in the Second Count of the Second Indictment.

11. The evidence is insufficient to support a verdict of guilty under the Second Count of the Second Indictment.

12. The government has wholly failed to prove a prima facie case under the Second Count of the Second Indictment.

13. The undisputed evidence shows that the defendant had on file with the draft board a letter, dated June 7, 1954, which showed a permanent address, San [fol. 442] Diego, California, to which mail from the draft board would always reach him; that is to say, his parents' address, known as 650 Eleventh Street,

San Diego, California, and, therefore, as a matter of law, the defendant cannot be guilty of failing to keep his draft board informed of an address where mail would always reach him on February 1, 1955.

14. The undisputed evidence shows that the Order to Report for induction was mailed to the wrong address; that is to say, the Modesto address instead of the San Diego address of 650 Eleventh Street, San Diego, California. Therefore, the defendant should be found not guilty on all three counts and the two indictments.

15. The undisputed evidence shows that the defendant is not guilty as a matter of law as charged in the First Count of the Second Indictment in that the evidence shows that he did not learn of the Order to Report for induction or facts giving rise to a continuing duty until late in the afternoon of April 9, 1956, at Santa Monica, California, making it impossible for him to carry out any continuing duty before the close of business on that date, which is the only date that the government can rely upon under the indictment based on a failure to perform a continuing duty.

16. The undisputed evidence shows that the defendant [fol. 443] did not have a reasonable opportunity after learning of the continuing duty on April 9, 1956, in time to perform such duty and, therefore, the defendant is not guilty as a matter of law of failing to carry out such continuing duty.

17. The defendant is not guilty under Count Three, the Second Count of the Second Indictment, charging him with failing to keep the board notified of where mail would reach him because the undisputed evidence shows that he was living at Modesto, California, on February 1, 1956, the date charged in the indictment and he can not be convicted for failing to notify the board of a change of address after February 1, 1956, and, had mail been sent to him from the board on or before February 1, 1956, it would have reached him at the Modesto address, shown upon the draft board file.

18. The undisputed evidence shows that the Order to Report for Induction was not actually deposited in the mails and there is no proof of an invariable office custom of mailing of the Order to Report for Induction by any competent witness and, therefore, there is not a valid order supporting the indictment.

19. The undisputed evidence shows that the card notifying the defendant of his classification, which is alleged to have been mailed on September 2, 1955, was [fol. 444] not mailed to San Diego but was directed to the wrong address in Modesto, and, therefore, the defendant was denied his rights to take an appeal or request a personal appearance and, otherwise, exhaust his remedies as provided for in the regulations.

20. The undisputed evidence shows that the defendant was denied his rights to exhaust his remedies by the local board in mailing the Order to Report for Induction to the right address and the defendant has, therefore, been denied substantial rights to make his defenses as guaranteed by law.

21. Section 1632.14 of the Selective Service Regulations, upon which the First Count of the Second Indictment is based, providing among other things that it is the duty of the defendant from day to day to report to his local board, is unconstitutional, as construed and applied, because it denies the defendant due process of law contrary to the Fifth Amendment to the United States Constitution.

22. Section 1642.2 of the Selective Service Regulations, upon which the First Count of the Second Indictment is based, providing among other things that it is the duty of the defendant from day to day to report to his local board, is unconstitutional, as construed and applied, because it denies the defendant due process [fol. 445] of law contrary to the Fifth Amendment to the United States Constitution.

23. Section 1632.14 of the Selective Service Regulations providing that the defendant has a continuing duty from day to day to report for induction is vague,

indefinite, constitutes a dragnet, does not enable the defendant to ascertain the time when the continuing duty arose or when it ended, it enables the government, the Court and the jury to speculate as to what act constitutes a violation of the law and it enables the government to charge the defendant with a violation of the act under circumstances when it is impossible to perform a duty required of him under the act and for each and every one of these reasons, the regulation and the act making such regulation applicable, as construed and applied, is unconstitutional and void, contrary to the Fifth Amendment to the United States Constitution.

Section 1632.14 of the Selective Service Regulations also, by its vague and indefinite terms, deprives the defendant of the benefit of the statute of limitations, and of course the statute, while not involved in this case, enables the Government to rely upon any vague and indefinite time in the future which the defendant has no way of knowing, and the defendant must re- [fol. 446] spond to the indictment based on that regulation.

24. Section 1642.2 of the Selective Service Regulations providing that the defendant has a continuing duty from day to day to report for induction is vague, indefinite, constitutes a dragnet, does not enable the defendant to ascertain the time when the continuing duty arose or when it ended, it enables the government, the Court and the jury to speculate as to what act constitutes a violation of the law and it enables the government to charge the defendant with a violation of the act under circumstances when it is impossible to perform a duty required of him under the act and for each and every one of these reasons, the regulation and the act making such regulation applicable, as construed and applied, is unconstitutional and void, contrary to the Fifth Amendment to the United States Constitution.

Section 1642.2 of the Selective Service Regulations also, by its vague and indefinite terms, deprives the

defendant of the benefit of the statute of limitations, and of course the statute, while not involved in this case, enables the Government to rely upon any vague and indefinite time in the future which the defendant has no way of knowing, and the defendant must respond to the indictment based on that regulation.

[fol. 447] 25. Section 1641.3 of the Selective Service Regulations, providing that the defendant is charged with conclusive notice of the contents of the 1-A Classification of the Selective Service card, mailed on September 2, 1955, and the contents of the Order to Report for Induction, mailed on October 28, 1955, is unconstitutional and void, as construed and applied, because it enables the Court and Jury to convict and sentence the defendant under the act without due process of law and enables the jury to convict and the Court to sentence without proof of any knowing violation of the law by the defendant, all contrary to the "fair" and "just" provisions of the act and the due process clause of the Fifth Amendment to the United States Constitution.

26. The final 1-A Classification by the local board is arbitrary and capricious because there is a denial of the ministerial classification and the conscientious objector classification under the act and regulations without basis and fact, thereby making the final order to report for induction void.

27. There is a denial of procedural due process before the local board in making the final classification because the local board followed the recommendation of the Department of Justice appearing in the file that the defendant be denied his conscientious ob- [fol. 448] jector status because of his belief in self defense and theocratic warfare.

28. The defendant was denied procedural due process of law by the Department of Justice hearing officer who denied him, upon a conscientious objector hearing, the right to a full and fair hearing, the right to explain the reasons for his "yes" or "no" answers,

insisted upon by the hearing officer, and because the hearing officer was personally prejudiced against Jehovah's Witnesses and all other persons having conscientious scruples against the performance of military service.

29. The defendant was denied procedural due process of law by the Department of Justice because it withheld favorable evidence appearing in the original FBI reports supporting his sincerity and his conscientious objector claim, which would have supported the defendant's conscientious objector claim before the local board at the time of the last classification of the defendant.

30. The defendant was denied procedural due process of law because the formal typewritten report of the hearing officer was not included in the draft board file, contrary to the act and the regulations and because the amended regulation, providing for the exclusion of the hearing officer's report, is void because it is in conflict of the act and prior regulations ap- [fol. 449] proved by Congress when the act was passed in 1948 and re-enacted in 1951.

Wherefore, for each and every one of the above and foregoing reasons, the defendant prays the Court, pursuant to the Rules of Criminal Procedure, to render and enter a judgment of acquittal under the First Indictment containing one Count and under each of the Two Counts of the Second Indictment.

DENIAL OF MOTION FOR JUDGMENT OF ACQUITTAL

The Court: The motion for judgment of acquittal is denied as to each and all of the grounds stated.

Does that complete our work?

Mr. Covington: Yes sir Judge.

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(Whereupon, the case proceeded further in open court as follows:)

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[fol. 451] The Court: I am going to instruct the Clerk to take Exhibit 1L for identification, which was the balance of the papers taken from the Draft Board file, and on the back of each one of them make notes that it is part of Exhibit 1L for identification only, so that there will be no question about them getting mixed up with the other papers that go to the jury.

Mr. Covington: That is satisfactory.

I thought there was one other exhibit that you admitted for the Court's use only.

[fol. 452] The Court: Exhibit 1A is for the Court's use only and that will not go to the jury, of course.

I instructed the Clerk, and I assume he has done it.

As to Exhibit 1H, which was received in evidence, I think I instructed the Clerk of the Draft Board to take those original sheets out of 1L and put them in Exhibit 1, so that Exhibit 1 would be the complete file of papers before the Draft Board.

There is also a separate Exhibit M, the Registration Card.

Mr. Hornbaker: May I have Exhibit M, the Registration Card?

The Clerk: Did you want to inquire of Mrs. Haisch whether she took this letter out?

The Court: You did that, didn't you, Mrs. Haisch?

Mrs. Haisch: I don't believe I did.

The Court: It will be taken care of before it goes to the jury.

Proceed.

* * * * * * *

[fol. 493] INSTRUCTIONS OF THE COURT

The Court: Ladies and gentlemen of the Jury: you have heard the evidence and the argument. Now it is time for the Court to instruct you as to the law.

A Federal Judge sits in the tradition of the common law Judges of England, who used to, and still do, instruct Juries orally, sometimes with hardly a scratch of paper. I wish I had the ability to do that. First, I do not, and secondly, our Appellate Courts, I am afraid, are a little more strict

and view with a little more care such informal instructions. So accordingly, certain of the instructions I will read to you. Others I will try to talk to you about.

You as Jurors are the sole judges of the facts in the case. You must follow the law as stated in the instructions of the Court and apply that law to the facts as you find them.

You are not to single out any one instruction alone as stating the law, but must consider the instructions as a whole.

You are not concerned with whether the law is a good law or a bad law. The laws were passed by Congress. It is your duty to follow the law as given you by the Court, regardless of what your views of the law may be.

You were chosen in this case to try the issues of fact that are raised by the charges made in the indictments and the plea of "Not Guilty" made by the defendant. The plea of "Not Guilty" is, in substance, a denial, and so this charge [fol. 494] made by the Grand Jury and the plea of the defendant of "Not Guilty" raises the issues of fact that you are to try. You are to perform your duty without bias or prejudice as to any party. The law does not allow Jurors to be governed by sympathy, prejudice, or public opinion. The public, the accused and the Court, all parties, expect that you will consider the evidence impartially and follow the law and reach a just verdict, regardless of the consequences.

The law presumes a defendant in a criminal case to be innocent of any crime. Thus a defendant, although accused of crime, starts with a clean slate. The presumption of innocence alone is sufficient to acquit a defendant, unless the Jurors are satisfied, beyond a reasonable doubt, of the defendant's guilt from all the evidence in the case. The presumption of innocence continues throughout the case and into the Jury Room and until such time as you arrive at a verdict one way or the other in the case.

A reasonable doubt is a fair doubt based upon reason and common sense and arising from the state of the evidence. It is rarely possible to prove anything to an absolute certainty. Proof beyond a reasonable doubt is established if the evidence is such as you would be willing to rely and act upon in the most important of your own affairs. A

defendant is not to be convicted on mere suspicion or conjecture.

A reasonable doubt may arise not only from the evidence [fol. 495] produced, but also from a lack of evidence. The burden is on the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged. The law does not impose upon a defendant the duty of presenting any evidence. The reason for that is that under our American system of jurisprudence it is the Government's burden to prove the defendant guilty and not the defendant's burden to prove himself innocent.

A reasonable doubt exists in any case when, after a careful and impartial consideration of all the evidence, the Jury do not feel satisfied to a moral certainty that the defendant is guilty of the charge.

An indictment is but a formal method of accusing a defendant of crime, the method used in our American system of jurisprudence, and you will draw no inference of guilt from the fact that a defendant has been indicted.

There are two types of evidence upon which a Jury may properly convict a defendant of an offense. One is direct evidence—what a witness sees and hears and reports to you directly. The other type of evidence is circumstantial evidence—the proof of a chain of circumstances pointing to the commission of the crime.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that, before convicting, a Jury be satisfied beyond a reasonable [fol. 496] doubt of the defendant's guilt.

Circumstantial evidence involves the use of inferences. You will recall the two examples I gave you when you were being impaneled—the example of the person standing on the street, who saw the child playing in the street, turned his back, and heard the car. I told you about this, didn't I? He saw the child hurt in the street. There was no direct evidence in that case that that automobile hit that child. That was circumstantial evidence. That was a chain of circumstances and the drawing of inferences—one inference based upon some fact that was proved that permitted the person in that situation to draw that inference. I gave you the other example of a high building and the umbrellas on

the street. I told you then, and I tell you now, that some inferences are so direct that they strike you right in the face. There are other inferences which people may want you to draw which reason and common sense tell you are too remote and can't be drawn. You have to do this just like you do this in your everyday walks of life.

Statements and arguments of counsel are not evidence, unless the parties stipulate. There is one stipulation in this case concerning the fact that Mr. Weeks, the F.B.I. Agent, was present; and he is now dead.

Mr. Covington: Also, your Honor, that he interviewed the defendant on April 9th at 3:30.

The Court: That is right.

[fol. 497] Those facts are agreed upon and must be accepted.

The evidence in the case consists of the sworn testimony of the witnesses, the Exhibits that are received in evidence —those that are marked for identification only don't go to you and are only to preserve the record in the case to see what we were talking about when we eliminated this or that or the other thing. So the evidence is the sworn testimony of witnesses, the Exhibits that have been received in evidence, all applicable presumptions, all stipulated facts, and of course all inferences that you may properly draw.

You are to consider only the evidence in the case, but in the consideration of the evidence you are not limited to the bald statements of the witnesses. You are entitled to draw from the facts which have been proved such inferences as seem justified in the light of your own experience.

The presumptions in the case—there will be several of them mentioned. We have already heard about the presumption of innocence. We will hear about the presumption that a witness speaks the truth. We will hear something on the subject of the inference from the performance of an official duty, etc. But you will see the various presumptions as we go along.

Legally, we define an inference as a deduction or conclusion which reason and common sense leads the Jury to draw from facts which have been proved.

A presumption is an inference which the law requires [fol. 498] the Jury to make from particular facts.

So that as soon as a man is on trial as a defendant the law requires you to draw the inference which we call the presumption of innocence, which continues until you find, beyond a reasonable doubt, that he is proved guilty. The minute a witness takes the Witness Stand the law requires you to draw the inference that the witness is going to speak the truth and that he speaks the truth. And that is a rebuttable presumption. We say we "presume" the witness speaks the truth. That is rebuttable. It may be overcome as I will tell you about. A presumption continues in effect until overcome by evidence to the contrary, and unless so outweighed the Jury are bound to find in accordance with the presumption.

The Jury are the sole Judges of the credibility of the witnesses. By "credibility" we mean how much—all, part or none—of the testimony of the witness you believe and how much weight you attach to the testimony of a witness. This is your sole function. It is not mine. I rule on what evidence may come in properly before you. I don't rule or give any intimation as to whether I believe or disbelieve a witness. That is your sole function.

A witness is presumed to speak the truth. But this presumption can be outweighed by the manner in which the witness testifies, by the character of the testimony he gives, or by contradictory evidence—the fact that the wit- [fol. 499] ness has been contradicted by another witness or that he contradicts himself or that at different times he states different stories. You should carefully scrutinize the testimony given and the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor and manner while on the Witness Stand. Consider also any relationship each witness may bear to either side of the case; the manner in which each witness might be effected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence.

You do this, as I told you when I impaneled you, much the same way that you judge the credibility of people who make presentations of fact in everyday walks of life. Here,

it is true, a witness has taken an oath to tell the truth, but that is a rebuttable presumption. You do this, if you will think about it, every day in your life. Somebody makes you some representations. You look at the person and scrutinize him and listen to what he is saying and use your own good sense and when the person gets through you say, "I believe every word that person said." Or you may say, "I don't believe a word he said. The truth isn't in him." Or you may say, "I believe this, this and this, but I cannot go for that." You do this every day in your life, if you just think about it.

[fol. 500] You may find inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses, but we all know that misrecollection and failure to recollect are common experiences. So you should look into two matters: first, if you find any discrepancy, is this a matter that pertains to an important detail of the case? And secondly, is the discrepancy a result of willful falsehood or innocent error or mistake? When you answer those two questions you will go a long way in solving any discrepancies which you may find. If you find that the presumption of truthfulness as to any witness is outweighed, you may give the testimony of that witness such credibility, if any, as you may think it deserves.

A witness may be discredited or impeached by contradictory evidence; or by evidence that at other times the witness has made statements which are inconsistent with the witness' present testimony.

If you believe any witness has been impeached or discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely as to any material matter, you have a right to disregard all the other testimony of that witness, or you may give that witness such credibility as you may think it deserves.

Where the defendant takes the Witness Stand he is to be judged in the same manner as any other witness—by the [fol. 501] same standards.

It is the duty of the attorneys, as evidence comes in, to object to what they think is not proper, and it is the duty

of the Court to rule on the objections. When I overrule an objection and let the evidence in, that doesn't mean that I believe it or that I think it is significant. I just mean that it is properly part of the record for you to consider. If I sustain an objection and keep it out, you are not to consider it, you are not to speculate on what it would have concerned.

At all times you are the sole judges of the facts and of the credibility of the witnesses.

If the proof shows that the Government had available for call or subpoena a witness who was employed by the Draft Board at the time in question, whose duty it was to deposit the outgoing mail in the United States Post Office Box at the time in question and the Government failed to call such a witness, you are entitled, if you desire, to draw an inference that such witness, if the witness had been called, the testimony would have been unfavorable to the Government and favorable to the defendant. On the other hand, you are not compelled to draw that inference if you, under the facts as you see them in this case, think that that inference is not properly drawn. You may or you may not.

Any stipulation between counsel is binding on you. I think I have already covered that.

[fol. 502] There is a presumption that a letter or postcard properly addressed, stamped and duly mailed by the addressor was received by the addressee in the due course of mail.

When the fact of notice is made by statute to rest upon the presumption that a letter mailed was received, there must be clear proof of the mailing.

Before there arises a presumption of fact that the addressee of a letter has received it, it must first be proved that it was properly addressed. But no such presumption arises unless it appears that the person to whom the communication was sent was at or in contact with the place to which the communication was mailed.

The presumption of receipt from mailing cannot be based upon the other presumption, unsupported by direct evidence, that a public officer performed his or her duty in mailing a letter.

To establish mailing of a letter containing notice, in the absence of direct evidence, there must be proof of an invariable custom or usage in an office of depositing mail in a certain receptacle, that the letter in question was deposited in such receptacle, and in addition there must be testimony by the employee whose duty it was to deposit the mail in the Post Office that he or she either actually deposited that letter in the Post Office or that it was the invariable custom to deposit every letter placed in the office [fol. 503] receptacle in the United States Post Office or Mail Box.

You are further instructed that a Registrant is not required to remain in one place or to notify the Local Board of every address even if the address is temporary. The Regulation is satisfied when the Registrant, in good faith, provides an address by which mail sent to that address furnished to the Board may be by the Registrant reasonably expected to come into his hands in time for compliance.

You are instructed that, in dealing with the Draft Board and writing letters to it, the defendant was not and is not to be considered by you as though he were engaged in litigation represented by a lawyer, but you must consider his actions in the same way as any other man his age, intelligence, background and experience.

There are two indictments in the case, and the indictments will be sent to you into the Jury Room. The first indictment is one count, and I will only summarize it. As all the indictments do, it talks about the setting up of the Draft Board, etc. But the first indictment, Number 26877, alleges that the defendant was classified 1-A and was notified of said Classification and a Notice and Order by said Board was duly given to him to Report for Induction into the Armed Forces of the United States of America on November 8, 1955 in San Diego County, California, and that at said time and place the defendant did knowingly fail and neglect to perform a duty required of him under [fol. 504] the Act, etc. I am only summarizing it.

First, let me tell you this. These symbols that are used in the Selective Service System mean the following: 1-A is the Classification of a man who is eligible for and can be ordered inducted into the Armed Forces; 1-O is a Clas-

sification given to a Conscientious Objector; and 1-AO, which is not involved here—

Mr. Covington: Your Honor, it does appear as one of the Classifications in the Draft Board files.

The Court: Then I had better mention it. And 1-AO, or 1-OA—I guess it is 1-AO—is a person who is classified as a Conscientious Objector but who is available for non-combatant service in the Armed Forces—that is, he can be ordered to wear a uniform and to do clerical work, yard work, research or anything that didn't involve carrying a gun or shooting another man. Classification 3-A is a dependency Classification—a person who has dependents, either children or parents or persons dependent upon him. Classification 2-A is an occupational Classification—a deferment because of being occupied in work of importance or necessary for the welfare of the United States.

I think that covers the ones that we have had here.

Mr. Covington: That is correct.

The Court: Is that satisfactory?

Mr. Covington: Yes sir.

[fol. 505] Mr. Barwick: Did you want to mention 4-D?

The Court: Pardon me.

Classification 4-D—sometimes these are written as an Arabic IV and sometimes as a Roman 4—4-D is a ministerial Classification, and if a Draft Board gives a person a 4-D or ministerial Classification he is deferred from active service in the Armed Forces.

That is what those Classifications mean.

I tell you now, and I will instruct you later, that the question whether this defendant was properly classified from time to time, and particularly whether he was properly classified 1-A at the time spoken of in the indictment, is a question of law for the Court and is no concern of yours at all. It is not an issue before you. The law has set up Draft Boards to make these Classifications. Draft Boards are made up of people in the community. Draft Boards make classifications based upon evidence or matters presented before them. There are procedures for review and appeal, and there is finally a procedure where the Court may, as a matter of law, review these Classifications. It is not a function of the Jury to determine whether

this defendant should have been classified in any one of these Classifications. You must accept, for the purpose of this trial, the Classifications as given by the Board.

So we were talking about the first indictment, and it charges the failure to Report for Induction on November 8, [fol. 506] 1955. Now that indictment doesn't say, "On or about"—it says "On November 8, 1955," and that indictment does not allege any continuing duty; and you are instructed, as to that first indictment, that the defendant had no obligation, insofar as that indictment was concerned, to report for induction after November 8, 1955, and in that indictment he is not charged with any failure to report for induction on any other date than November 8, 1955, and you cannot convict him of any failure to report after November 8th. That first indictment talks just about November 8, 1955, and the continuing duty business is not involved in the first indictment.

The second indictment is in 2 counts. The first count of the indictment, after again setting forth the set-up of the Board and the fact that Mr. Venus was classified 1-A, alleges that he was notified of the Classification, and that thereafter a Notice and Order was duly given for him to Report for Induction on November 8, 1955 in San Diego County, California, and that at said time and place he failed to report. And then it alleges—and this is the gist of the working part of the indictment—that the defendant Venus thereafter had a continuing duty from day to day under said Act and the Regulations promulgated thereunder, to report to said Board for induction, and that on or about April 9, 1956 the defendant Venus, within this District and Division, knowingly failed and neglected to perform said continuing duty required of him under said Act and [fol. 507] the Regulations promulgated thereunder, in that he knowingly failed and neglected to report to said Board for induction into the Armed Forces.

You will notice that this first count of the second indictment is the one that talks about the continuing duty, and it alleges that he failed in this duty on or about April 9, 1956. The Court is going to instruct you later that if there is proof—well, I will instruct you later that this continuing duty continued at least for one week. I took that period

as an arbitrary period, as a reasonable time to report, and therefore will instruct you later about that. I call your attention to that now merely in passing.

The second count of the second indictment again sets forth the Constitution of the Board, and then alleges that defendant Venus had a duty to keep said Board advised at all times of the address where mail would reach him, and that on or about February 1, 1955, in this Division and District aforesaid, defendant Venus knowingly failed and neglected to perform said duty required of him under said Act and the Regulations promulgated thereunder in that he knowingly failed and neglected to keep said Board advised of the address where mail would reach him.

Now this indictment alleges that this occurred on or about February 1, 1955. The proof that you heard on that encompasses a period not earlier than February 1, 1955 and [fol. 508] running up to February 20th or 21st, 1955, and the Government is making no contention that if Mr. Venus mailed the change of address on February 20th or 21st, whatever the date was he claimed he mailed it, that that was too late. The Government's contention is that he didn't mail it.

So therefore this count is going to concern solely that simple issue, was that notice mailed sometime in February? It doesn't make any difference when it was mailed in February, if it was mailed. It is just about that simple. The Government doesn't have to prove the exact date. The Government alleges that the defendant did not do this act on or about the 1st of February. But the proof, as I say, encompasses a period that runs on up to the 20th. And I'm going to instruct you later, and I will tell you right now, that if you find the defendant did mail that change of address as he testified he did, then your duty on that count is to acquit him. The sole issue on that count is, did he or did he not send that change of address in February to his Local Board?

Those are the three counts, and you will have to keep them in mind as the Court goes ahead with its instructions.

Section 462 (a) of Title 50 Appendix of the United States Code provides in part that:

" . . . Any person who . . . knowingly . . . evades or refuses . . . service in the Armed Services . . . or who in any manner shall knowingly fail or neglect or refuse to perform [fol. 509] any duty required of him under . . . (The Universal Military Training and Service Act) . . . or Rules or Regulations or directions made pursuant to (Said Act) . . . " shall be guilty of an offense.

Section 1632.14 (a) of the Regulations made pursuant to the Universal Military Training and Service Act and having the force of law since it is a Regulation made pursuant to authority, reads as follows:

"When the Local Board mails to a Registrant an Order to Report for Induction (SSS Form No. 252) . . . , it shall be the duty of the Registrant to report for induction at the time and place fixed in such order . . . Regardless of the time when or the circumstances under which a Registrant fails to report for induction when it is his duty to do so, it shall thereafter be his continuing duty from day to day to report for induction to his Local Board . . .

and the Section goes ahead:

" . . . And to each Local Board whose area he enters or in whose area he remains."

That part is not before us, but just to complete the Regulation.

The purpose of this Regulation is obviously this. It says " . . . Regardless of the time when or the circumstances under which a Registrant fails to report for induction when it is his duty to do so, it shall thereafter be the continuing duty . . . " Suppose a defendant was seriously ill when he [fol. 510] received the Notice and when he got the Notice he was physically unable to go. The law says that he has a continuing duty day by day to go down and fulfill that Order. Of course, it uses this broad language "Regardless of the circumstances." Suppose a Notice of Induction came to a man's home and anybody from looking at the envelope could tell it might well be a Draft Notice. Suppose he says, "I don't want to read this. Bill, you open the letter and read it." So Bill opens the letter and reads it and says, "Yes, that is a Notice to Report." Well, the law is not

going to quibble about that. The man had Notice of the Order, he has a duty to report, and he has a continuing duty to report.

At any rate, you have heard that Regulation, which has the effect of law.

You are therefore instructed that the defendant had a continuing duty to report certainly on November 8, 1955, and thereafter for some considerable time, and I have limited that to a week aribtrarily just to cut this case down to size, if he obtained knowledge of the terms of the Order at a time when this obligation was incumbent upon him. It should really be worded the other way: If the defendant obtained knowledge of the terms of the Order to Report at the time when the obligation was incumbent upon him, then he had a continuing duty to report. Certainly if he obtained Notice on or before November 8th, then he had a duty to report on November 8th and thereafter for at least [fol. 511] a week, as I have arbitrarily limited it, from day to day.

Section 1641.3 of the Reguations under the Universal Military Training and Service Act provides in part:

"It shall be the duty of each Registrant to keep his Local Board advised at all times of the address where mail will reach him."

This Regulation has the force of law, and of course the purpose of this Regulation is obvious—so that the Draft Board can get Notices to young men when they are required to report.

You are not sitting as a Court of Appeal to determine whether the Local Board was correct in its determination of the Classifications of the defendant. The Local Board's action is final and you are bound to accept the Classification given to the defendant. You are to deterimne from the action of the Local Board and all the other evidence in the case whether there was a refusal on the part of the defendant to do what the law required, namely, to report for induction into the Military Service parsuant to the lawful Order of the Local Board, and whether, if you find beyond a reasonable doubt that there was such a refusal, the defendant did so refuse knowingly.

I am going to stop at this point—my further instructions are not too extensive, and I will give you the remaining instructions in the morning. Can you come in at 9:15?

The Jurors: Yes.

[fol. 512] The Court: Remember that the case has not been submitted to you. There are still further instructions of the Court to come. Therefore, you are still bound by the admonition of the Court not to discuss the case among yourselves or with anyone else, or to permit anyone to discuss it with you, and you are still admonished not to form or express any opinion on the guilt or innocence of the defendant until the case is finally submitted to you for your decision.

You will be excused until 9:15 tomorrow morning.

[fol. 514] San Diego, California, Thursday, May 12, 1960, 9:15 A.M.

The Clerk: 1-26877 and 28989-Criminal United States vs Carlin Constantine Venus. Further Jury Trial.

The Court: The case on trial. The Jury present in their places. The defendant present with counsel.

Ladies and gentlemen of the Jury, yesterday evening we had part of the instructions, and just to refresh your recollection, the first indictment in one count charges the failure to report for induction on November 8, 1955, and in the second indictment, count one is the count that has been referred to as involving a continuing duty and it is the one that alleges on or about April 9, 1956 defendant knowingly failed to perform a continuing duty required and that he knowingly failed and neglected to report to said Board for induction into the Armed Forces. Count two of the second indictment is the count which charges that on or about February 1, 1955 defendant Venus knowingly failed and neglected to keep the Board advised of the address where mail would reach him.

I am merely paraphrasing the indictments. You will have them before you. I am doing this because the next instructions will pertain to the particular counts of the indictment.

One other matter before I pass on to that. The Order to Report for Induction, which, you will find in the file Exhibit

1, ordered the defendant to report at the Greyhound Bus Depot. I think you recall the Regulation which I read to [fol. 515] you with reference to continuing duty to report. I will not read it again. But in part it provides that it shall thereafter be his continuing duty from day to day to report for induction to his Local Board. So that any problem about the Greyhound Bus Depot specified in the Order to Report for Induction on November 8th, insofar as it involves any obligation on or after April 9th, is affected by that Regulation which says that the continuing duty is to report to his Board from day to day.

Going ahead with the instructions of the Court as to this first indictment charging the November 8th date and the first count of the second indictment charging on or about April 9th, if you should find that an Order to Report for Induction was not mailed to the defendant's last known address, then you must return a verdict of Not Guilty as to those two counts.

Again, as to the first indictment and the first count of the second indictment, if you should find that no Notice to Report for Induction was given the defendant, then a verdict of Not Guilty must be returned as to those two counts.

As to the first indictment only charging the November 8th date, you are instructed that in order to convict under the first indictment, you must find and believe beyond a reasonable doubt that the defendant had actual knowledge of the terms of the Order to Report before November 8, 1955, and if you find or have reasonable doubt thereof that he did not know of the terms of the Order before November [fol. 516] 8, 1955 then you must acquit him of that charge in the first indictment.

Now, as to count one of the second indictment, the April 9th situation, if you find that the F.B.I. Agent on April 9, 1956 instructed the defendant that there was nothing for him to do except for him to communicate with the Local Board, and that the defendant believed him and followed that advice, then you may find that the defendant has not knowingly neglected or refused to perform the so-called continuing duty under count one of the second indictment.

Now, as to count one of the second indictment, the April 9th situation, in count one of that indictment defendant is

charged that he failed on or about April 9, 1956 to report to his Draft Board following the issuance of the Order to Report for Induction which is dated October 28, 1955.

It is not necessary that the failure to report have occurred on April 9, 1956. The indictment alleges that it occurred, "On or about" that date. If the defendant on April 9, 1956 knew of the Order to Report for Induction previously issued, he had a continuing duty day by day, under the Selective Service Regulations on and after April 9, 1956, to report to his Draft Board for induction into the Armed Forces.

If, within a reasonable time, namely, one week after April 9, 1956, defendant knowingly failed or neglected to report to the Draft Board, then the offense is complete.

I have merely fixed arbitrarily the one week period to [fol. 517] limit your consideration to that problem. I did during the trial permit the defendant to show what he had done within 60 days following the April 9th date, you will recall, and I think I fairly summarize the evidence when I tell you that all that was done within the 60 day period was a letter written by the defendant on April 9, 1956. Subsequently you heard some reference to a letter in August. But within the 60 day period which I fixed, that was the showing made by the evidence in the case.

If the defendant, even though he knew on April 9, 1956 of the Order previously issued to report for induction, did not report because of mistake or misunderstanding or other innocent reason, or if the defendant did not have the specific intent as described in this instruction, he should be acquitted. I am talking now of count one of the second indictment.

Now as to count two of the second indictment—that is the failure to keep the Board advised of his address, you are instructed that if you find and believe that the defendant deposited in the United States Mail in Los Angeles in February, 1955 a card notifying the Local Board of the change of address, then whether or not the card was received by the Local Board, the defendant should be acquitted on count two in the second indictment.

In other words, on that count two in the second indictment that issue is very simple. Did this defendant some

[fol. 518] time in February, 1955 mail the card which he claims he mailed? Obviously, if he mailed that card which he has testified about, he could have no intent to violate the law and to fail to keep the Board advised of his address because he had done whatever a person would be expected to do. If he did not mail that card, that is a different situation. So that count is a very simple one. The question hinges on whether he did or did not mail that card. He has testified that he did. You can believe him, or you don't have to believe him. It is up to you to decide where the truth lies. But you are not concerned with what particular date that card was mailed in February, because the Court has already instructed you that the area covered in the evidence, sometime between the first and the 21st, is close enough to the charge in the indictment and is a close enough time for the defendant's mailing the change of address card. In other words, the fact that he may have moved on the 8th and didn't send the card until the 20th is not important.

So the whole thing on that count centers on whether or not he mailed that card. I have just instructed you that if you find that he did mail the card, then you shall acquit him. On the other hand, if you find, beyond a reasonable doubt, that he did not mail the card, and the other elements of the offense are made out, then you should convict him.

In every crime there must exist a union or joint operation of act, or failure to act, and intent. The burden is always [fol. 519] upon the prosecution to prove both act, or failure to act, and intent beyond a reasonable doubt.

In two of the counts, the first indictment and the first count of the second indictment, defendant is being charged with failure to report for induction and is not charged with failure to submit to induction. The issue, therefore, as to intent is not the question as to any intent of the defendant not to submit to induction, but the question is of defendant's intent on the matter of reporting for induction.

With respect to lesser offenses, if it be shown that a person has knowingly committed an act denounced by law as a crime, intent may be presumed from the voluntary doing of the forbidden act.

Let me give you an example. When we speak of "Lesser crimes" we are talking about misdemeanors. Suppose you are color blind and you drive up and park your car in a red zone and you get a ticket. Legally, from a strictly legal standpoint, you could argue all day and you could still be convicted for violating that ordinance. Because it is a misdemeanor—the law has prohibited you from doing a certain thing—they are not interested in your state-of-mind and they assumed you intended the things you did and therefore you have no defense. As a practical matter, no Judge, when you proved to him that you were color blind, would let that offense stand. But legally in a misdemeanor we are not concerned with the operation of the defendant's [fol. 520] mind.

That is not true of major crimes—felonies, and this is a felony. In major crimes there must be specific intent proved before there can be a conviction.

Specific intent, as the term itself suggests, requires more than a mere general intent to engage in certain conduct. We define it as follows: a person who knowingly does an act which the law forbids, or knowingly fails to do an act which the law requires, intending with evil motive or bad purpose either to disobey or to disregard the law, may be found to act with specific intent. An act or failure to act is done knowingly if done voluntarily and purposely, and not because of mistake or inadvertence or other innocent reason.

This again, is an example of how the law has grown up based on common sense. With respect to major crimes, before a man can be convicted he must have intent to disobey or to disregard the law. In regard to minor crimes we are not so concerned about it.

We are interested in what is a man's intent, what is his state of mind? In the defendant's case, for example, if you find that he failed to do something he should have done but you find that it was done by mistake or inadvertence or some good excuse, certainly he shouldn't be convicted. That is just common sense, and the law has carried that into these rules as to intent. On the other hand, if you find that [fol. 521] he did something knowingly and with intent to

disobey or to disregard the law, then you have a different situation entirely. Your decision may be the reverse.

I was going to again refer to the indictments, but I don't need them. You will notice that each of the indictments alleges the words did "knowingly" do this, did "knowingly" do that. So the instruction I have given you on specific intent is tied into the language of the indictment.

No matter how much progress we have made in the field of science, there is still no method of taking an X-Ray of a man's mind and telling you what his intent is. His intent may be proved by circumstantial evidence. It rarely can be established by any other means. Witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do or what he says, but there can be no eye-witness account of his state of mind. What a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged.

In determining the issue as to intent, the Jury are instructed to consider any statements made and acts done or omitted by the accused and all facts and circumstances in evidence which aid determination of state-of-mind.

It is not necessary for the prosecution to prove knowledge of the accused that a particular act or failure to act is a violation of law. Unless and until outweighed by evidence [fol. 522] to contrary, the presumption is that every person knows what the law forbids and what the law requires to be done. However, evidence that the accused acted or failed to act because of ignorance of the law is to be considered in determining whether or not the accused acted or failed to act with specific intent as required.

In simple lay language we mean that ignorance of the law is no defense, but ignorance of the law might have something to do—should be considered if you find there is ignorance of the law, with reference to specific intent. Did the defendant intend—did he knowingly do the act? Did he knowingly disregard or fail to perform a duty?

You will note that the omission or failure to act as charged in the indictment is alleged to have been "knowingly" done. The purpose of adding the word "knowingly" was to insure that no one would be convicted because of a

failure to act due to mistake or inadvertence or other innocent reason.

The law of the United States permits the Judge to comment to the Jury on the evidence in the case. Such comments are only expressions of the Judge's opinions as to the facts, and the Jury may disregard them entirely, since the Jury are the sole judges of the facts. I now intend to comment briefly and what I have to say now are not instructions of law and you may disregard them entirely, and when I come back to my legal instructions I will so inform you.

[fol. 523] This case in some ways is very difficult and in some ways it is easy. It is not a complicated factual situation. You have the 3 counts. The first count charges that on November 8, 1955 the defendant failed to perform his duty of reporting to the Draft Board at the Greyhound Depot. There is no doubt but that the Order of Induction was issued—that is, typed up, made, created. A copy of it is in the file. You have heard the testimony of the Clerk of the Draft Board as to her practice, hers and that of the other "girls", if I may use the term, in the office to put all this Draft Board mail in a receptacle and before the day was ended someone then would take it out and put it in the Mail Box. You have been connected with business organizations where similar practices were carried on. Instead of taking a letter out every 2 minutes to the Mail Box, take it out at one time and mail it. That Notice, according to the testimony, was mailed to Modesto. You heard the testimony in the record. This, by the way, was mailed on or about October 28, 1955, according to the testimony. The defendant testified that he moved from Modesto about February 7th or 8th. As I recall, he said he left no change of address. And of course you heard about how the building was torn down. So that by April, 1955 there was no building there. There was a car lot. And this Notice, according to the testimony, was mailed in October, 1955. Now the defendant says that he mailed a card changing his address, advising the Board where mail would reach [fol. 524] him, back in February, 1955.

So, you have issues of fact as to whether or not this Notice was mailed, whether the Board mailed it to the right

place, whether or not the card was mailed by the defendant in February changing the address, all of which issues of fact must be considered by you in eventually reaching your decision. I will not attempt to outline them all.

It is not necessary that the evidence show that the defendant actually got this Order to Report in his hand or that he actually saw it. I gave you earlier a suppositions example of a person who just didn't want to have anything to do with a notice that might be coming from a Draft Board, so he says to a friend, "Is there a letter over there? I don't want to look at it. You look at." (sic) So the friend looks at it and says, "Uncle Sam wants you." The fellow would say, "Well, don't show it to me." In a case like that a man could conceivably—I am giving you an example that has nothing to do with any evidence in this case, I am just trying to show you how this might work—in that event that man might come into Court and swear under oath that he had never seen the Order to Report for Induction. Did he know he had been ordered to report for induction? Absolutely. The law, in connection with raising an argument, is not going to stand for, to use the language of the street, that kind of monkey business. The question is, did this defendant know about the contents of that Order to Report [fol. 525] dated about October 28, 1955? And that is an important question in connection with this case.

On the second count, in the matter of continuing duty, you have heard the evidence on that. There is no dispute that the F.B.I. Agent told him that he had been ordered to report for induction at an earlier date, not the one back in 1954. He had been ordered to report by the Order of October, 1955. And there was some conversation with the F.B.I. Agent. So you have a dispute. Apparently at the first trial the defendant did not testify to the extent that he testified at this trial. At this trial for the first time he says that the Agent told him there was nothing he could do about it. At the first trial the F.B.I. Agent was in the Courtroom, but after the defendant testified he was not called as a witness. The F.B.I. Agent is now dead. The defendant now relates matters which he did not relate at the first trial. The defendant says that part of that was because the Judge,

Judge Picard, said "Hurry up. Just give us the essential details. Don't run too long in one place" etc. Those are things you are going to have to decide bearing on this question of credibility of witnesses, particularly the credibility of the defendant.

Following that conversation with the F.B.I. Agent, the only thing you have in the file is the letter dated April 9, 1956, written the same day by the defendant. Having in mind that that day the F.B.I. Agent had talked to this man, [fol. 526] having in mind what you know about this case, I suggest that you read that letter very carefully, trying honestly to determine what was going on in the defendant's mind—what he knew or what he didn't know. That is an important piece of evidence both to the defendant and to the Government in this case. If the defendant knew that he was to report on that date, April 9, 1956, and knew that the Order had been issued, then he had a continuing duty day by day to go down to the Draft Board—not to the Greyhound Depot, but to the Draft Board—and report for service. If, when he got down to the Draft Board, he refused to submit, that is something else again—a person has, as it were, a sort of right to break the law. The defendant is charged only with failing to report; he is not charged with failing to submit.

Your final count is the count concerning the change of address. I have already mentioned that. It is a simple question. Did the defendant, or did not the defendant, mail that post-card in February, 1955? We are not particularly concerned with the date.

Further than that, I am not going to comment. I'm not going to tell you what witnesses I believe or disbelieve. It is essentially your function. What I have had to say is merely trying to point up for you the issues you have to determine.

Now, to return to the instructions of law which you are required to follow. What I have just said to you in my [fol. 527] comments you may disregard entirely, since you are the sole judges of the facts.

The defendant is not on trial for any act or conduct not alleged in the indictment.

The verdict must represent the considered judgment of each Juror. Each Juror must agree thereto regardless of which way your verdict goes.

You have three different charges. You must separately consider each one. What you do on one charge may or may not indicate what you do on another. There is no particular reason because you find one way on one charge you have to find one way on another. They are separate offenses. The evidence pertaining to them must be separately considered.

It is your duty, as Jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow Jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow Jurors, or for the mere purpose of returning a verdict.

There is nothing peculiarly different in the way a Jury [fol. 528] is to consider the proof in a criminal case from that in which all reasonable persons treat any question depending upon evidence presented to them. You are expected to use your good sense; consider the evidence for only those purposes for which it has been admitted and give it a reasonable and fair construction in the light of your common knowledge of the natural tendencies and inclinations of human beings.

The punishment provided by law for the offenses charged in the indictment is a matter exclusively within the province of the Court. It is not to be considered by the Jury in arriving at an impartial verdict as to the guilt or innocence of the accused.

Upon returning to the Jury Room, you will select one of your number to act as Foreman. The Foreman will preside over your deliberations and be your spokesman in Court.

Forms of Verdict have been prepared for your convenience. We have 2 sheets of paper. One is the Form of Verdict in the first case, Number 26877. It has the

name of the case and says, "We, the Jury in the above entitled case, find the defendant, Carlin Constantine Venus, ——— as charged in the indictment," and a place for the Foreman's signature and a place for the date. The second sheet of paper is numbered in the second case 28989 and it has the name of the case and the Court and reads, "We, the Jury in the above entitled case, find the defendant, Carlin Constantine Venus, ——— as charged in count [fol. 529] one of the indictment, ——— as charged in count two of the indictment," and a place for the Foreman's signature and the date.

You will take these Forms with you to the Jury Room. The Exhibits will be sent to you. The indictments will be sent to you. When you have reached unanimous agreement as to your verdict, have the Foreman fill out the Verdicts to which you agree and return with them into Court. At any time you desire you may report the Verdict on one count or one indictment, if that is your desire.

If it becomes necessary during your deliberations to communicate with the Court, send a note by the Bailiff. In the State Courts you may tell the Bailiff or the Court how you stand numerically—we stand 11 to 1, we stand 6 to 6. But you can't do that in the Federal Court. It is reversible error. So do not tell the Court or the Bailiff how you stand numerically until such time as you arrive at a Verdict.

It is proper to add that nothing said in these instructions, in the form of the Verdict, nothing in my comments is to suggest or convey to you in one way or another what Verdict I think you should find. What Verdict you find is the sole and exclusive responsibility of the Jury. Had a Jury Trial been waived, I would have had the responsibility of deciding the facts and the law and that would be my job and I would undertake it and accomplish it. But this case is being tried by a Jury, as the law pro- [fol. 530] vides—the defendant is entitled to a Jury, and therefore you have the responsibility on the facts. It is not my responsibility at all. It is my responsibility to conduct the trial and to instruct you as to the law. It is your responsibility, then, to decide the facts of the case and to arrive at a verdict as to guilt or innocence.

I think it will be more convenient, counsel, if we adjourn to Chambers for the purpose of making the record.

The Jury remain in their places in the custody of the Bailiff.

Counsel, the Clerk and the Reporter, come to Chambers. Mr. Venus (the defendant), you may be present, if you desire.

(Proceedings in Chambers:)

The Court: In the Jury's absence we now accord Counsel a chance to make their jurisdictional record as to requests for instructions denied and as to objections to instructions given.

Pursuant to our understanding at our conference on instructions, the entire record of that proceeding is now incorporated by reference, and the objections then made by Counsel to the instructions which the Court said he was going to give and the objections to the instructions which the Court said he was going to refuse are now again incorporated by reference, and the Court now again overrules the objections.

Mr. Covington: The same as though they were made [fol. 531] at this time.

The Court: The same as though they were made at this time. So you don't have to repeat what you said before.

* * * * * * *

COLLOQUY BETWEEN COURT AND COUNSEL REGARDING INSTRUCTIONS

Mr. Covington: Now may it please the Court, yesterday afternoon and again this morning—I believe this is per- [fol. 532] haps due to inadvertence, in view of our discussion when we were considering the requests—the Court, in submitting Count 2 of the second Indictment, about failing to keep the Local Board informed at all times as to where mail would reach him and that this violation occurred on February 1, 1955, or thereabouts, the Court put that Count to the Jury yesterday afternoon and again this morning in discussing that mailing of that card from Los Angeles and told the Jury that if he mailed it he

ought to be acquitted—I don't dispute what the Court said at all, that is perfectly proper—and that if he hadn't mailed it, then he could be convicted. But that ought to be modified or in some way the Jury ought to be instructed so as to allow the Jury to acquit the defendant even if they believe that he hadn't mailed the card, because of that June 7, 1954, letter, which we interpret, and which may be reasonably interpreted or construed by the Jury as constituting notice of an address where he could at all times be reached by mail.

The Court: Did you have a specific instruction on that?

Mr. Covington: I am pretty sure that we did.

The Court: If you did have, I don't remember it.

Mr. Barwick: It is an instruction on the interpretation of the letter, and I think you gave it. But the thing is that it was given earlier, and then twice, yesterday afternoon and again this morning, you framed it as if the only thing that they really had to decide was, did he mail the [fol. 533] card or didn't he?

The Court: Counsel, you know that the instructions are to be considered as a whole. I think I have given you an exceedingly fair instruction on that count. I have even said that this business of the time lag is to be disregarded —we are not concerned with that.

Mr. Covington: We are not trying to take the attitude that the Court has been unfair with us. I figure that if the Jury says, "The only thing we have to consider in this third count is that business about whether or not he mailed the card," their minds will be completely taken away from the other part of the charge where they may consider the earlier letter and paper in the file.

The Court: I will pass up ruling on this to see what your other objections are.

Mr. Covington: I want to take exception to that part of the charge where the Court on two separate occasions mentioned this hypothetical situation of a man being at home and the order being delivered to his house and having Joe Doaks receive it for him and saying, "No, I don't want to see it." While I think that is true hypothetically, as a matter of law that issue is not involved in this case

because nowhere in the record does there appear what the Court so said.

The Court: I so told the Jury.

Mr. Covington: Yes, that it is just hypothetical.

[fol. 534] The Court: I told the Jury that it had nothing to do with the facts proved in this case.

Mr. Covington: I am just wondering if it is not an inappropriate instruction in view of the fact that there is no such circumstance in this case, and the Jury may go out and further speculate, "Well, maybe he got the order and somebody else got it and he told them, 'No, I don't want to look at it.'" There is not one iota of evidence in here that would suggest any such thing, and I take exception to that hypothetical situation mentioned on two occasions.

The Court: Overruled.

Mr. Covington: I also except to those parts of the Court's charge where the Court has arbitrarily put this figure of one week. It is true that the Court extended that, and it is true that they allege "on or about." I take this exception in view of the fact that we have heretofore excepted to the reading of the definition of "continuing duty" by reason of the vagueness and indefiniteness of that regulation.

The Court: I think you have available to you all your exceptions as to continuing duty. But I don't think the record will show that you have available to you any objection as to the one week. There was no objection made when we discussed it. As a matter of fact, as it turned out, the thing inured to your benefit, because you argued that he wrote the letter and that it would have been at [fol. 535] least a week or more before he would have even got a reply. So if anything you got a break on that.

Mr. Covington: I am not criticizing the Court that the Court is being unfair with us in this matter.

The Court: Your point is that it is an example—

Mr. Covington: —of the vagueness that I have heretofore complained about in that earlier exception to the reading of the regulation.

The Court: Of course, you have a right to object even

now to that one-week business, even though you didn't object when we were settling the instructions.

Mr. Covington: I understand.

The Court: But I understand that your objection is that the regulation is indefinite and uncertain, and that the fact that the Court and Counsel, in substance, agreed on one week is a demonstration of it. Is that about it?

Mr. Covington: That is it, your Honor.

The Court: Overruled.

Mr. Covington: That part of the Court's charge where the Court commented upon the facts—and I am not taking an exception to that part of the charge as it stands, because I don't take the attitude that the Court has given a one-sided or pro-Government charge; I think that generally the comment of the Court on the facts was fair—but there is one part of the comment on the facts that I [fol. 536] found to be exceedingly prejudicial, and it is that part of the Court's comments wherein the Court in discussing the evidence about the conversation between Mr. Venus and Mr. Irwin Weeks, the Agent of the F.B.I. upon the occasion that he called there, and after making that comment the Court took up and more or less repeated the argument that the Government's Counsel made yesterday afternoon to the Jury that the F.B.I. Agent was present in Court and was not called. The evidence shows that the defendant did not know that the F.B.I. Agent was there. He learned it after the last trial. And furthermore the evidence shows that he was an employee of the Government, and Counsel for the Government had him there. We didn't bring him there. Under the law, there was no duty on the part of the defendant to call and put him on the witness stand, and the failure to do so is no blame or no count against the defendant. Therefore, that particular part of the charge is excepted to.

The Court: I tried to be fair on that. I pointed out what Mr. Venus had testified to; that Judge Picard had hurried him along.

Mr. Covington: That is true.

The Court: I tried to be even-handed.

Overruled.

Mr. Covington: Here is the thing that I want to bring back and put on the record at least, and the Court reminded the Jury about it. On the former trial the only [fol. 537] question involved was whether or not he received that notice of November 8, and the charge and the entire trial was limited to that first indictment. It was after the last mistrial because of a hung jury that the Government brought into this case, as shown in two separate motions in this case, the first and second counts of the second indictment, involving continuing duty and this business about the Board not being notified as to where mail would reach the defendant. And this testimony that has been brought out, there was absolutely no occasion for the defendant on an earlier occasion to give testimony on this extensive conversation with the F.B.I., and in view of the testimony that certainly cannot be disputed that Judge Picard did rush him along and did tell him to be brief and there were times when he reminded the defendant not to talk too much, and so—

The Court: Off the record—

(Remarks off the record.)

The Court: That is your objection then.

Mr. Covington: I want to go ahead and make the record a little more specific on the matter and make sure that I don't overlook some things that occurred to me when I didn't make all my notes when the Court was talking.

In view of that, I am going to ask the Court to withdraw all those comments from the Jury. I don't think the Court intended to gag us or to be unfair with us. On the other hand, I think it is an improper charge and I ask the [fol. 538] Court to withdraw those remarks entirely and in lieu thereof to give defendant's request number 78. Because if there is any presumption that can be drawn about that F.B.I. Agent not being in court at the last trial, it would be against the Government and certainly not against the defendant because he was not an employee of or under the control of the defendant. It is a rule of law that when a witness is under the control of a party to the case, the failure of the party to call the witness, especially when the witness is in the courtroom, would

give rise to the presumption that his testimony would be in favor of the defendant and against the one who failed to call him.

The Court: The objection is overruled. The request is denied. I have attempted to give you a fair trial, and I have attempted to give fair instructions. Maybe you don't think I have done it, but I did the best I could.

Mr. Barwick: On the whole, I thought the instructions were pretty good.

Mr. Covington: Except those to which we took exception. We don't mean to let the record show that we are satisfied, because we have to do our duty as counsel for the defendant, and we are not waiving any of the rights we are bound by law to preserve for the defendant.

Mr. Barwick: One misstatement you made yesterday at the end of the day, when you were talking about continuing duty, you misspoke when you said that they could consider [fol. 539] one week after November 8. I know you meant April 9. I noticed one or two jurors raise their hands.

The Court: That means that they were following the instructions.

Mr. Hornbaker: I was going to mention that, and I forgot.

Mr. Barwick: I didn't want to interrupt your Honor at the time.

Mr. Hornbaker: It was when you were reading Instruction No. 3 of the Government.

The Court: Also, I will say something on that exception that I passed up. What I am going to say is approximately this. I will not be able to use the same words, but this will be the substance of it:

In my comments I told you that on Count 3 the sole issue was whether or not he had mailed this letter. Defense Counsel have called my attention to the fact that they have contended that because of the prior letter in the file there was an address available, so that whether he sent the card on February 4 or not the file would show that he had complied with the law.

Mr. Covington: In view of that, we will withdraw the exception based on that ground. When the Court does that, we will be satisfied. I want the record to show that

if the Court tells the Jury what he had told us he is going to tell the Jury, then we will not make any complaint about that.

[fol. 540] The Court: All right.

(Proceedings resume in open court before the Jury as follows:)

The Court: The case on trial. The Jury present in their proper places. Defendant present with his Counsel.

In one of my instructions yesterday afternoon, when I was getting weary, and probably you were, too, I misspoke, and apparently some of the jurors caught it immediately. I think you probably know what I am talking about.

I was talking about continuing duty and Count 1 of the second indictment that concerned the continuing duty and about the one week that I arbitrarily fixed as the time within which would be the period to comply, and I said November 8, 1955, when I meant one week after April 9, 1956. So my instructions will stand corrected.

One other matter I want to mention to you. In my comments when I was summarizing the issues on the last count, Count 2 of the second indictment, on the matter of keeping the Board advised of his address, I said that the issue was entirely the issue, Did he or did he not mail that card in February 1955? Defense Counsel have called my attention to the fact that it is one of their contentions that there was a previous letter in the file in which the defendant had stated something about where mail might reach him. It is, therefore, their contention that whether or not he mailed [fol. 541] that letter of February 1, 1955, on their theory of the case, there was a place where mail would reach him and he therefore had complied. I call that to your attention because I had overlooked that contention of the defendant in summarizing the issues on that count.

Is that satisfactory?

Mr. Covington: Yes, your Honor, assuming that the Jury will understand that if they find that there is such letter in the file that he may be acquitted.

The Court: No, Mr. Covington, it isn't whether they find such letter in the file.

Mr. Covington: I mean if they believe—

The Court: This is an inadvertence on your part.

Mr. Covington: Yes, your Honor.

The Court: If the Jury find that the defendant had at all times kept the Board advised where mail would reach him, then of course he is to be acquitted.

Mr. Covington: That is right.

The Court: It is not a question whether they find that letter in the file.

Mr. Covington: No, I don't mean that. But they can consider that as a basis for acquittal.

The Court: Are my remarks satisfactory?

Mr. Covington: Yes, your Honor.

Mr. Hornbaker: Yes, your Honor.

[fol. 542] The Court: Mr. Clerk, swear the Bailiff.

(Whereupon, the Clerk duly swears the Bailiff to take charge of the Jury.)

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[fol. 571] The Court: At least, this is some exercise, better than sitting down.

The jury again present in their proper places. The defendant present with his counsel.

Mr. Foreman, do you have a verdict on one count?

The Foreman: Yes sir.

The Court: Will you hand the document to the bailiff?

Mr. Clerk, will you read the verdict?

VERDICT

The Clerk: (Reading): "United States District Court, [fol. 572] Southern District of California, Southern Division, United States of America Plaintiff versus Carlin Constantine Venus Defendant Number 28989 Criminal. Verdict. We, the jury in the above entitled cause, find the defendant Carlin Constantine Venus blank as charged in Count One of the Indictment, and guilty as charged in Count Two of the Indictment. Signed Edward W. Stahl, Foreman of the jury. Dated May 14, 1960 at San Diego, California."

Ladies and gentlemen of the jury, is this your verdict as to Count Two of the Indictment as presented and read to you?

The Jurors: Yes.

The Court: Do you care to have the jury polled?

Mr. Barwick: Yes, your Honor.

The Court: Poll the jury, Mr. Clerk.

(Whereupon, the Clerk inquired of each of the jurors individually whether this was their verdict on Count Two as presented and read, and each juror respectively answered either "yes" or "it is.")

The Court: The Clerk will record the verdict as to Count Two in Case Number 28989.

Ladies and gentlemen, I don't know when a jury has laboured as hard and as diligently as you have, and frankly I want to say I am amazed and pleased at the serious way in which you went about your business. As a matter of fact, you have picked out the count as to which, in my mind, the guilt of the defendant was the clearest. This is the count of failing to keep his Draft Board advised where [fol. 573] mail would reach him.

I have a word or two to say and then you may go. The case will be put over to a later date for sentence and I am going to discharge you.

Mr. Foreman, you have been unable to agree on the other two counts?

The Foreman: Yes.

The Court: I am going to discharge you as to the other two counts, the count in the First Indictment and the First Count in the Second Indictment.

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[fol. 575] MATTER REFERRED TO PROBATION OFFICER, ETC.

The Court: The jury now absent.

When would you like to have this set for sentence, Mr. Barwick?

Mr. Barwick: Would your Honor want a probation report?

The Court: Well, if you desire, I will have one. Of course, he will not comply with any order of his Board to report for service.

Mr. Barwick: Yes, I understand that.

The Court: You put a man on probation only when he says "I am sorry for what I did and I promise to obey the law."

I will order a report. I am in no hurry about this matter. Mr. Venus has business affairs to get in order. When would you like the sentence set?

Mr. Barwick: How long does the probation report take as a rule, your Honor?

The Court: Will you be here Monday to see the Probation Officer?

Mr. Barwick: Yes.

The Court: I will set it for Tuesday, May 31, 1960, then. [fol. 576] It doesn't have to be an extensive report. I set it for Tuesday because Monday is a holiday.

The matter will be referred to the Probation Officer for a pre-sentence investigation and report. The hearing of that report and the matter of sentence are set for Tuesday, May 31, 1960 at 2:00 P.M.

Mr. Venus, you may remain on bond pending sentence.

Mr. Barwick: He is out on O.R., your Honor.

The Court: He may remain on his promise to be here.

The Defendant: I'll be here, your Honor.

The Court: The Court will be in recess.

(Recess at 6:35 P.M. of said day.)

San Diego, California, Tuesday,
May 31, 1960, 2:00 P.M.

(Other matters.)

The Clerk: 10-26877 Criminal and 28989 Criminal United States of America versus Carlin Constantine Venus.

(Present the defendant and his counsel Mr. Barwick, and the plaintiff represented by Mr. Hornbaker.)

The Court: Mr. Barwick.

Mr. Barwick: Ready, your Honor.

The Court: Proceed.

RENEWAL OF MOTION FOR JUDGMENT OF ACQUITTAL

Mr. Barwick: The first thing I would like to bring to the Court's attention is a renewal of the motion for judgment of acquittal.

At this time, may it please the Court, comes the defendant—

[fol. 577] The Court: You don't have to re-read the motion. You have made the motion.

Mr. Barwick: That is right. It is renewed on each and every ground as heretofore set forth.

The Court: To what counts?

Mr. Barwick: As to all counts, your Honor, on the grounds set forth in the written motion already on file with the Court.

The Court: Mr. Hornbaker, I am inclined to grant the motion as to Count One of the First Indictment and as to Count One of the Second Indictment.

Mr. Hornbaker: The Government opposes the motion for judgment of acquittal on those grounds, your Honor. The basis for the opposition is found in Barron's Federal Practice and Procedure, Volume 4, pages 234 and 235. It is there stated that if, on the evidence, it is reasonably debatable whether guilt has been proved beyond a reasonable doubt, the motion must be denied.

Now on those grounds—

The Court: Before you go any further, that is the law. There is no doubt about it. But there has got to be an end to this case some time. If you want to move the dismissal of the First Indictment and Count One of the Second Indictment, then I will deny these motions. But we are going to be through with this case one way or the other. I am not talking about Count Two of the Second Indictment [fol. 578] on which the defendant was convicted.

Mr. Hornbaker: No, I do not move for the dismissal of count one of the indictment No. 26877 and count one of indictment No. 28989, because I believe the fact that a Jury has disagreed on those two counts makes it reasonably debatable whether or not guilt has been proved beyond a reasonable doubt, and that on a motion for judgment of acquittal the Court must take the view of the evidence and inferences most favorable to the prosecution.

The Court: You are correct in the law. If you want to insist on that, there is no doubt that you are correct on the law. Will you object to the Court's dismissing those two counts on its own motion in the interests of justice, on the ground that there have been now four trials?

Mr. Hornbaker: I would object to the Court's dismissing those counts, your Honor, until such time as I have discussed the matter with the United States Attorney.

DENIAL OF MOTION FOR JUDGMENT OF ACQUITTAL, ETC.

The Court: The motion for judgment of acquittal on all counts is denied. The Court on its own motion dismisses indictment No. 26877 in the interest of justice on the grounds that there have been four trials in this case, and dismisses also count one in indictment No. 28989 upon the same ground.

Mr. Hornbaker: I call the Court's attention to the fact that there has been only one trial on count one of the indictment No. 28989.

[fol. 579] The Court: Oh yes. But the case itself has been tried on four occasions.

All right, Mr. Barwick. Now omit from any presentation all this material you had thrown in your motions that have nothing to do with count two of the second indictment.

Mr. Barwick: That is correct, your Honor.

At this time I would like to renew the motion of the judgment of acquittal as to the second count of the second indictment.

The Court: You have just renewed it, and I denied it.

Mr. Barwick: Your Honor, I would like you to reconsider. I want to give you some specific facts as to just that count. It will be very brief, because the count itself is quite simple.

The one thing I want to point to the Court's attention is that under the Second Count of the Second Indictment the charge is failure to keep the Board notified of an address where mail will always reach him. That is the essence of it.

Now your Honor, the letter in the file of June 7th, as you know, gave his parents' address.

The Court: His parents moved later on.

Mr. Barwick: Yes, your Honor, that is correct; the parents moved on or about February 20th—18th, 19th, something like that—of 1955, and as the Court instructed the jury they were limited from February 1 to on or about [fol. 580] February 21, 1955. There is absolutely no evidence whatsoever of any sort that had a letter been mailed to him either in Modesto or in San Diego that it would not have reached him in time for compliance between February 1st and February 21st, 1955. In fact, the Government even argued to the jury that even if he was not in Modesto he certainly would have got a notice there because his employer knew where he was and all his friends knew. The Government by its own argument conceded that mail would have reached him at that time.

I would like to point out what was said in the case of—

The Court: Is it in your memorandum?

Mr. Barwick: Yes, your Honor.

The Court: I read your memorandum.

Mr. Barwick: The particular case I am referring to is the one cited on the first page, *Caldwell versus United States*. In that case the Court said it was not a violation of the statute for a defendant willfully to neglect—

The Court: I read it.

Mr. Barwick: Now your Honor, even if the jury believed, and they could have, that he mailed no card changing his address, that doesn't prove the case. The Government had to go further and show, beyond a reasonable doubt, that if a letter or order had been mailed to Modesto between February 1st and February 21st it wouldn't have reached him. They can't speculate on that. There was no evidence on that.

[fol. 581] Furthermore, I believe, as a matter of law, under the *Bartchy* case that if the defendant provided an address at his parents, and they not having moved—and even had they moved within the time period specified by the Court prior to February 1, 1955, there was no dispute but that they left a forwarding address because his father said "I wanted to get my pension check," so if a notice had gone to that address it would have been forwarded; so he did have in the file an address at which he could always be reached.

The Court: If your argument were sound, a registrant could give one address when he registered and then he could move around all over the country and he then could say, "Well, I had an original address. If you had sent the notice there it would have been forwarded on to number two and number two would have forwarded to number 3, number 3 to number 4, 4 to 5." That is not what was contemplated when the Regulation was formulated that the defendant was to keep the Board advised where mail would reach him. This meant where it would reach him with a reasonable dispatch in time for him to respond to the notice to report for induction.

Mr. Barwick: That is correct. As the *Bartchy* case said, he must furnish a chain of addresses so that the letter will reach him in time for compliance. Here, between February 1st and February 21st, there is only one forwarding address necessary. Under the example you gave, if he had [fol. 582] moved six times we might conclude that he never would have got it in time to comply within ten days. That is true. But here we have only one change.

The Court: You offered no instruction on those points. You were willing to submit the matter on a purely factual situation, and I gave a very favorable instruction: If the jury found that he had mailed this letter—he said he mailed it in February—anytime in February, or whatever that period was, then that they should acquit him; and you agreed at the time that it was a very favorable instruction, you and your co-counsel.

Mr. Barwick: Yes, your Honor. We took no exceptions to the instruction at the time. But this is a renewal of the motion for judgment of acquittal. The Court must pass on this as a matter of law.

The Court: It is denied.

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[fol. 587] The Court: Your motion and application to have the juror examined is denied. That disposes of that part of it.

Anything further on your motion for a new trial?

Mr. Barwick: Nothing other than that set forth in the actual motion itself, your Honor.

MOTION FOR NEW TRIAL DENIED

The Court: All right, the motion for a new trial is denied. Are you ready for sentence?

Mr. Barwick: Yes, we are, your Honor.

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[fol. 592] SENTENCE

The Court: All right, Mr. Venus, will you stand up, please.

On Count Two in Case Number 28989 it is the judgment of the Court that you be sentenced to the custody of the Attorney General or his authorized representative for imprisonment for a period of three years and fined the sum of $500. It is ordered that you stand committed until the fine is paid.

I overrule the Government's position as to a fine.

In this particular case, since you knew you were never going to report for induction no matter whether you got a notice or not, you could have saved the Government a lot of expense by a plea of guilty and disposed of the matter, and accordingly the fine of $500 has been imposed.

Mr. Barwick: May it please the Court, could we have a stay of execution until I have prepared our notice of appeal? There are a few blanks in it because I didn't exactly know what the sentence was going to be, and I would like [fol. 593] to file that as soon as I have typed in the blanks.

The Court: You may file it this afternoon.

Mr. Barwick: Yes.

The Court: But I don't propose to grant bond on appeal in this case.

Mr. Barwick: In other words, you will not grant bond on appeal?

The Court: No, I don't propose to grant bond on appeal in this case. If some other court wants to do it, that is their privilege. But the new Rule provides that bond may be allowed pending appeal unless it appears that an appeal is frivolous or taken for delay, and in my opinion this case presents purely a factual question which was decided adversely to the defendant at the trial. The instruction on

this particular count was very fair. The jury was told that if they believed that he had sent a letter at any time during February 1955, sent a card at any time during February 1955, they should acquit him, in just so many words; and the jury found that he had not kept his Draft Board advised of the place where mail would reach him. In my opinion, I see no grounds for an appeal from a purely factual matter, and I think any appeal is frivolous and for the purpose of delay and to delay the service of a sentence and the payment of the fine.

Mr. Barwick: And the Court denies the motion for a stay of execution?

[fol. 594] The Court: Yes, the motion for a stay of execution is denied.

You haven't made an application for bail pending appeal.

Mr. Barwick: At this time, your Honor, I would like to make an application for bail pending appeal.

The Court: I don't know whether your motion properly lies before you file the notice or not.

Mr. Barwick: I can file the notice in a few minutes, your Honor.

The Court: Will it be stipulated that the record shows a notice of appeal was filed?

Mr. Hornbaker: Yes, your Honor.

Mr. Barwick: So stipulated, your Honor.

The Court: All right. Your application for bail on appeal is denied on the ground that the case as made on Count Two presented a purely factual question which was decided adversely to the defendant, that all other contentions went to the other counts of the two indictments, and that a favorable instruction was given to the jury and the jury found the defendant guilty and didn't believe him. Therefore, any appeal on this purely factual problem is frivolous and for the purpose of delay and not made in good faith.

For the life of me, I don't think you have any point on appeal. You can go through your appeal, if you want to, but you are merely delaying the final day of reckoning in [fol. 595] the case, and I don't propose to give the defendant bail on appeal. I would like to see him get this over with.

I might say one other word. In imposing the three-year sentence I contemplated that this defendant will make parole. I assume that probably he will make a good record in the institution and as a result he will serve a little less than a year. With good time off, he is eligible for parole in a third of his sentence. He will probably serve about a year. So I deliberately fashioned the sentence on the ground that he would make parole.

Mr. Barwick: I appreciate that fact, your Honor. He probably will.

The Court: I didn't impose the sentence with the expectation that he serve three years. But I think he will serve about a year of the sentence, a little less than a year.

Mr. Barwick: Thank you, your Honor.

The Court: Defendant will be committed.

• • • • • • •

[fol. 595a] Reporter's Certificate to following transcript omitted in printing.

(See Opposite ☞)

[fol. 596] EXHIBIT 1hh

Selective Service System

Approved of Budget Bureau not required

523

(EMERGENCY DECENTRALIZATION AREA)

U. S. GOVERNMENT PRINTING OFFICE

SELECTIVE SERVICE NUMBER: 4 14029 578

DATE OF BIRTH: Dec. 19, 1929 (MONTH) (DAY) (YEAR)

Name Venus, Carlin Constantine (Last) (First) (Middle)

Address 184 National Ave

Chula Vista (City or town) Calif. (County) (State)

Telephone _____ Race Wh.

LOCAL BOARD NO. 140
Room 222, 525 E Street
San Diego, California
(Stamp of Local Board)

COVER SHEET

Date of registration 15 Sept 1948

Date of mailing Questionnaire MAY 13 1949

CHANGES OF ADDRESS:

1. 949 Highland Ave. (Number and street or R. F. D. number) 8-8-50 (Date)
National City. (City, town, or village) (Zone) Calif. (State)
2. 4591 Point Loma Ave, (Number and street or R. F. D. number) 1-18-51 (Date)
San Diego, (City, town, or village) 7 (Zone) Calif. (State)
3. 650 11th St (Number and street or R. F. D. number) 6-6-52 (Date)
San Diego (City, town, or village) (Zone) Calif (State)
4. 3175 Cedar St (Number and street or R. F. D. number) 1-19-53 (Date)
San Diego (City, town, or village) (Zone) Calif. (State)
5. 650 11th St. (Number and street or R. F. D. number) (Date)
San Diego, Calif. (City, town, or village) (Zone) (State)
6. 1431 - 10th St. (Number and street or R. F. D. number) 6-7-54 (Date) 3
Modesto (City, town, or village) (Zone) Calif. (State) (Ind. & Ed. - mail c)

CLASSIFICATION

DATE	CLASS	DATE OF EXPIRATION
JUL 1 1 1950	1A	
OCT 2 7 1950	3-A	
SEP 1 4 1951	2-197	
NOV 7 1951	1-A	
JAN 9 1952	1-A O	
FEB 2 1 1952	2-A	8-21-52
SEP 2 4 1952	1-A	
OCT 1 5 1952	2-A.	4-15-53
JAN 7 1953	1-A	
4-13-54	1-A ag Ed	

CHANGES OF ADDRESS: [fol. 599] 214

1. 756 Pier ave. #1, 4-20-56
(Number and street or R. F. D. number) (Date)
Santa Monica, Calif.
(City, town, or village) (Zone) (State)

2. 302 Market St. apt #3. 11-15-56
(Number and street or R. F. D. number) (Date)
Venice - Calif.
(City, town, or village) (Zone) (State)

3. _____
(Number and street or R. F. D. number) (Date)
_____
(City, town, or village) (Zone) (State)

4. _____
(Number and street or R. F. D. number) (Date)
_____
(City, town, or village) (Zone) (State)

5. _____
(Number and street or R. F. D. number) (Date)
_____
(City, town, or village) (Zone) (State)

6. _____
(Number and street or R. F. D. number) (Date)
_____
(City, town, or village) (Zone) (State)

7. _____
(Number and street or R. F. D. number) (Date)
_____
(City, town, or village) (Zone) (State)

SCS Form No. 101

[fol. 598]

EXHIBIT 2hh

213

DUPLICATE FILE

Selective Service System

Approval of Budget Bureau not required

523

(EMERGENCY DECENTRALIZATION AREA)

U. S. GOVERNMENT PRINTING OFFICE

SELECTIVE SERVICE NUMBER C-1

4 140 29 578

DATE OF BIRTH

Dec 19, 1929

(MONTH) (DAY) (YEAR)

Name VENUS, CARLIN CONSTANTINE
(Last) (First) (Middle)

Address 184 National Ave.,

Chula Vista, California
(City or town) (County) (State)

Telephone _____ Race Wh

LOCAL BOARD NO. 140
Fox Theatre Bldg., Room 205
1215 - 7th Avenue
San Diego 1, California
(Stamp of Local Board)

COVER SHEET

2-42

Date of registration 15 September 1948

Date of mailing Questionnaire May 13, 1949

CHANGES OF ADDRESS:

1. 949 Highland Ave., 8-8-50
(Number and street or R. F. D. number) (Date)
National City, Calif.
(City, town, or village) (Zone) (State)

2. 4591 Point Loma Ave., 9-18-51
(Number and street or R. F. D. number) (Date)
San Diego, 7, Calif.
(City, town, or village) (Zone) (State)

3. 650 11th Street, 6-5-52
(Number and street or R. F. D. number) (Date)
San Diego Calif.
(City, town, or village) (Zone) (State)

4. 3175 Cedar St., 1-19-53
(Number and street or R. F. D. number) (Date)
San Diego, Calif.
(City, town, or village) (Zone) (State)

5. 650 11th St.,
(Number and street or R. F. D. number) (Date)
San Diego, Calif.
(City, town, or village) (Zone) (State)

6. 1431 10th St., 6-7-54
(Number and street or R. F. D. number) (Date)
Modesto Calif.
(City, town, or village) (Zone) (State)

7. 756 Pier Ave. #1 4-10-56
(Number and street or R. F. D. number) (Date)
Santa Monica Calif.
(City, town, or village)

SSS Form No. 101

CLASSIFICATION

DATE	CLASS	DATE OF EXPIRATION
Jul 11 1950	I-A	
Oct 27 1950	3-A	
Sep 14 1951	C-197	
Nov 7 1951	I-A	
Jan 9 1952	I-A-O	
Feb 27 1952	II-A	8-27-52
Sep 24 1952	I-A	
Oct 15 1952	2-A	4-15-53
Jan 7, 1953	I-A	
4-13-54	I-A * Ap. Bd.	
SEP 1 1955	Int. Cont.	

DUPLICATE

SELECTIVE SERVICE SYSTEM

COVER SHEET

Approval Not Required

215

[fol. 600] EXHIBIT 8th 523

Selective Service No.			
4	140	29	578

DATE OF BIRTH: December (Month) 19 (Day) 1929 (Year)

NAME: VENUS (Last) Gerlir (First) Constantine (Middle)

ADDRESS: 184 National Avenue (Number and Street or R. F. D. No.)

Chula Vista (City or Town) (Zone) (County) California (State)

(Emergency Decentralization Area)

LOCAL BOARD NO. 140
Fox Theatre Bldg., Room 205
1215 - 7th Avenue
San Diego 1, California

(Stamp of Local Board)

Date of Registration: September 15, 1948

Date of Mailing Questionnaire: May 13, 1949

CHANGES OF ADDRESS

	NUMBER AND STREET OR R. F. D. NUMBER	CITY, TOWN OR VILLAGE	ZONE	STATE	DATE
1	949 Highland Avenue	National City		California	8—8—50
2	4591 Point Loma Avenue	San Diego	7	California	9-18-51
3	650 - 11th Street	San Diego		California	6—5—52
4	3175 Cedar Street	San Diego		California	1-19-53
5	650 - 11th Street	San Diego		California	
6	1431 - 10th Street	Modesto		California	6—7—54
7	756 Pier Avenue #1	Santa Monica		California	4-10-56
8	302 Market St. - Apt. #3	Venice		California	11-15-56
9	2120 Park St. apt. A	Santa Monica		Calif.	2-6-58
10	756 Pier Ave. Apt #3	Santa Monica		Calif	11-19-59
11					
12					
13					
14					

CLASSIFICATION

DATE	CLASS	DATE OF EXPIRATION
Jul 11 1950	1-A	
Oct 27 1950	3-A	
Sep 14 1951	1-A-O	
Nov 7 1951	1-A	
Jan 9 1952	1-A-O	
Feb 27 1952	1-A	8-27-52
Sep 24 1952	1-A	
Oct 15 1952	2-A	4-15-53
Jan 7 1953	1-A	
Apr 13 1954	1-A Ap. Bk.	
Sep 1 1955	1-A Cont	

SSS Form No. 101 (Revised 6-22-48)

Form approved
Budget Bureau No. [illegible]

Local Board No. 140
San Diego County

MAY 16 1949

8039 Adams Avenue
San Diego 4, California

SELECTIVE SERVICE SYSTEM

CLASSIFICATION QUESTIONNAIRE

Selective Service No. 4 | 140 | 29 | 578

Date of mailing MAY 13 1949

Date of birth: December 19, 1929 (Month) (Day) (Year)

Name: VENUS, (Last) Carlin (First) Constantine (Middle)

Address: 184 National Ave. (Number and street or R. F. D. route)

Chula Vista (City, town, or village) SD (Zone) California (County) (State)

Local Board No. 140
8039 Adams Avenue
San Diego 4, California

(STAMP OF LOCAL BOARD)

NOTICE TO REGISTRANT

You are required by the Selective Service Regulations to fill out this questionnaire truthfully and to return it to this local board on or before the date shown below. Willful failure to do so is punishable by fine and imprisonment.

THIS QUESTIONNAIRE MUST BE RETURNED ON OR BEFORE MAY 24 1949

[illegible]
Clerk or Member of Local Board.

(The above items are to be filled in by the local board before the questionnaire is mailed to the registrant.)

INSTRUCTIONS

This questionnaire is intended to furnish the local board with information to enable it to classify you. You will receive notice from your local board of your classification.

The registrant is required to sign the certificate on page 7. If another person assists the registrant in completing this questionnaire, the person assisting is required to sign the certificate on page 7.

1. Make no alterations in the printed matter in this questionnaire.

2. All spaces in this questionnaire that apply to registrants must be completed with the appropriate words or check marks.

3. If you furnish additional information or affidavits

[fol. 602]

EXHIBIT

8039 Adams Avenue
San Diego 4, California

CLASSIFICATION QUESTIONNAIRE

Selective Service No. 4 | 140 | 29 | 578

Date of mailing MAY 13 1949

Date of birth: December 19, 1929 (Month) (Day) (Year)

Name: VENUS, (Last) Carlin (First) Constantine (Middle)

Address: 184 National Ave. (Number and street or R. F. D. route)

Chula Vista (City, town, or village) SD (Zone) California (County) (State)

Local Board No. 140
8039 Adams Avenue
San Diego 4, California

(STAMP OF LOCAL BOARD)

NOTICE TO REGISTRANT

You are required by the Selective Service Regulations to fill out this questionnaire truthfully and to return it to this local board on or before the date shown below. Willful failure to do so is punishable by fine and imprisonment

THIS QUESTIONNAIRE MUST BE RETURNED ON OR BEFORE MAY 24 1949

Clerk or Member of Local Board.

(The above items are to be filled in by the local board before the questionnaire is mailed to the registrant.)

INSTRUCTIONS

This questionnaire is intended to furnish the local board with information to enable it to classify you. You will receive notice from your local board of your classification.

The registrant is required to sign the certificate on page 7. If another person assists the registrant in completing this questionnaire, the person assisting is required to complete the statement following the registrant's certificate. Imprisonment for not more than five years or a fine of not more than $10,000, or both such fine and imprisonment, is provided by law as a penalty for knowingly making, or being a party to the making, of any false statement or certificate regarding or bearing upon a classification.

If the registrant is an inmate of an institution and is unable to complete the questionnaire, the executive head of the institution shall communicate these facts immediately to the local board.

1. **Make no alterations in the printed matter in this questionnaire.**

2. **All spaces in this questionnaire that apply to registrants must be completed with the appropriate words or check marks.**

3. If you furnish additional information or affidavits with your questionnaire, attach the **same securely** to it.

4. **If you are now on active duty with the Armed Forces, obtain a certificate to that effect from your commanding officer. Execute only Series I and II of the questionnaire and return it, with certificate attached, to your local board.**

5. After this questionnaire has been returned, report to your local board at once any change of address, any change in place of employment or occupation, or any other new fact which may affect your classification.

SSS Form No. 100

[fol. 602]

EXHIBIT

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Statements in this questionnaire are confidential as prescribed in the Regulations

USE INK OR TYPEWRITER IN FILLING OUT THIS FORM

STATEMENTS OF THE REGISTRANT

Series I.—IDENTIFICATION

INSTRUCTIONS.—Every registrant shall complete all statements in this series.

1. My name is (print) VENUS (Last) CARLIN (First) CONSTANTINE (Middle)

2. In addition to the name given above, I have also been known by the name or names of None (If none, write "None")

3. My address now is 184 National Ave (Number and street or R. F. D. route)
Chula Vista (City, town, or village) 5 (Zone) (County) Calif (State)

4. My telephone number now is None (Town) (Exchange) (Number) (If you have no phone, write "None.")

5. My Social Security number is 370-26-4427 (If none, write "None")

Series II.—PRESENT MEMBERS OF ARMED FORCES

INSTRUCTIONS.—Every registrant who is a member of one or more of the groups named in this series shall supply the information called for under the appropriate item or items.

1. (a) I am at present on ACTIVE DUTY in the Armed Forces, the Coast Guard, the Coast and Geodetic Survey, or the Public Health Service as a ——— (Grade, rank, or rating) in the ——— (Branch of Armed Forces)

(b) Service or serial number — (c) I entered on active duty ——— (Date)

(d) My present tour of active duty will terminate ——— (Date)

2. (a) I am at present a member of a reserve component of the Armed Forces, NOT ON ACTIVE DUTY as a ——— (Grade, rank, or rating) in the ——— (Branch of Armed Forces)

(b) I entered into such component on ——— (Date)

(c) I am not (am, am not) performing service in such component by satisfactorily participating in scheduled drills and training periods as prescribed by the Secretary of Defense.

3. (a) I am at present (check appropriate box) enrolled in the advanced course, senior division, Reserve Officers' Training Corps ☐ or the Air Reserve Officers' Training Corps ☐; a member of the Naval Reserve Officers' Training Corps entered upon the junior or senior year ☐; a midshipman, United States Naval Reserve ☐; in the ——— (College or university)

(b) I acquired such status on ——— (Date)

4. (a) I am selected for enrollment or continuance in the senior division, Reserve Officers' Training Corps ☐; the Air Reserve Officers' Training Corps ☐; the Naval Reserve Officers' Training Corps ☐; I am appointed a midshipman, United States Naval Reserve ☐; and I have agreed in writing to accept a commission if tendered and to serve, subject to call by the Secretary of the Army, the Secretary of the Air Force, or the Secretary of the Navy, not less than 2 years on active duty after receipt of a commission.

5. I am a fully qualified and accepted aviation cadet applicant of the (check appropriate box) Army ☐; Navy ☐; Air Force ☐; and have signed an agreement of service for a period commencing on ..... (Date) and ending ..... (Date)

Series III.—PRIOR MILITARY SERVICE

INSTRUCTIONS.—Every registrant who has been on active duty as a member of the Armed Forces of the United States, the Coast Guard, the Public Health Service on active duty with the Armed Forces or the Coast Guard, or the armed forces of an allied country, shall complete the statements in this series. (Use a separate line for each term of service, listing last service first. If none, write "None.")

1. Branch of Armed Forces	Date of Entry Into Active Service (Month, Day, Year)	Date of Separation From Active Service (Month, Day, Year)	Type of Discharge (Honorable, Dishonorable, Bad Conduct, Undesirable, or other—Specify)
(Last service)			

2. Does service shown in Item 1 above include any time spent in attending any of the specialized or college training programs under the jurisdiction of the Army, Navy, Marine Corps, or Coast Guard; or as a cadet or midshipman in one of the armed service academies? Yes ☐; No ☐.

3. If your answer to Question 2 is "Yes," give the name of the program ..... date of entry ..... (Month) (Day) (Year) and date of release ..... (Month) (Day) (Year) from such specialized training or academy.

Series IV.—OFFICIALS DEFERRED BY LAW

1. I am at present the Governor of a State, Territory, or Possession; a public official chosen by the voters of an entire State, Territory, or Possession; a member of the legislative body of the United States or of a State, Territory, or Possession; a judge of a court of record of the United States or of a State, Territory, or Possession or the District of Columbia; my office is ..... None ..... (If none, write "None")

2. My term of office expires ..... (Date)

Series V.—SOLE SURVIVING SON

I am not (am, am not) the sole surviving son of a family of which one or more sons or daughters were killed in action or died in line of duty while serving in the Armed Forces of the United States or subsequently died as a result of injuries received or disease incurred during such service.

Series VI.—MINISTER, OR STUDENT PREPARING FOR THE MINISTRY

INSTRUCTIONS.—Every registrant who is a minister or a student preparing for the ministry shall complete the statements in this series that apply to him.

1. (a) I am not (am, am not) a minister of religion. (b) I do (do, do not) regularly serve as a minister.

(c) I have been a minister of the Jehovah God (Name of sect or denomination) since ..... (Month) (Day) (Year)

(d) I ..... (have, have not) been formally ordained. (e) If so, my ordination was performed on ..... (Month) (Day) (Year)

by ..... (Ecclesiastical official performing the ordination) at ..... (City and State)

2. (a) I ..... (am, am not) a student preparing for the ministry under the direction of .....

..... (Name of church or religious organization) in a theological or divinity school.

[101.604]

Series VII.—FAMILY STATUS AND DEPENDENTS

INSTRUCTIONS.—Every registrant shall complete this series.

1. (*a*) I have never been married ☒; I am a widower ☐; I am divorced ☐; I am married ☐ (Check appropriate box) (*b*) I ..... (do, do not) live with my wife; if not, her address is .....

(*c*) We were married at ..... (Place) on ..... (Date)

2. (*a*) I have ..... (Number) (If none, write "None") children under 18 years of age.

(*b*) Of these children, ... (Number) live with me in my home.

3. I have ..... (Number) persons other than those shown above, wholly or partially dependent upon me for support.

NOTE.—Every registrant should submit to the local board on a separate sheet attached to this questionnaire any additional information concerning his status with respect to persons dependent upon him for support which he believes should be considered by the local board.

Series VIII.—PRESENT OCCUPATION

1. Every registrant must check each of the following boxes appropriate to his case and follow the instructions indicated.

(*a*) I am now working on a farm, orchard, or ranch. ☐ { If this box is checked, complete Series IX.

(*b*) I am now working in a nonagricultural occupation. ☒ { If this box is checked, complete this series.

(*c*) I am now a full-time student. ☐ { If this box is checked, complete Series XI.

(*d*) I now have no employment nor am I a full-time student. ☐ { If this box is checked, complete Parts 7 and 8 of this series.

2. The job I am now working at is (give full title, for example: Construction draftsman, turret-lathe operator, stationary engineer, farm laborer, prosecuting attorney, physics teacher, policeman, marriage-license clerk, etc.):

Service Station Attendant & Cashier

3. I do the following kind of work in my present job (Be specific. Give a brief statement of your duties.):

General Service Station work and cashier

4. In my present job, I am (Check one box only)—

(*a*) A regular or permanent employee, working for salary, wages, commission, or other compensation ☒;

I have worked 4½ years in my present trade, and I do not (do, do not) expect to continue indefinitely in it.

(*b*) A temporary or occasional employee ☐; I expect that my present job will end about ..... (Date)

(*c*) An apprentice under a written or oral agreement with my employer, which expires ..... (Date) ☐

(*d*) An independent worker, working on my own account, not hired by anyone, and not hiring any help ☐.

(*e*) Working for my father or for the head of my family, but receiving no pay ☐

(*f*) An employer or proprietor hiring ..... (Number) paid workers ☐.

5. My employer is Lorrie and Eddie Cantor
(Name of organization or proprietor—not foreman or supervisor—write "Self" if self-employed)

1935 Market St. San Diego
(Address of place of employment—Street, or R. F. D. Route, City, and State)

The business is Television retailers, Repairers Tube Electric Station Engineers
(Nature of business, service rendered, or chief product)

I have been employed by present employer on .....
(Date)

(c) I am paid at the rate of $ 1.03 per hour ☒; day ☐; week ☐; month ☐.
(Check appropriate box)

(d) I work an average of 48 hours per week.

7. Other business or work in which I am now engaged is None
(Nature of business; if none, write "None")

8. Prior work experience Porter, Shipper, Caretaker, Stock Clerk

NOTE.—You may attach to this page a statement giving additional information which you think the local board should consider in determining your classification, which statement will then become a part of this questionnaire. Your employer may submit to the local board any information concerning your employment which he thinks the local board should consider in determining your classification.

Series IX.—AGRICULTURAL OCCUPATION

INSTRUCTIONS.—Every registrant who works on a farm, orchard, or ranch shall complete this series.

1. I work on or operate a farm, orchard, or ranch as (Check appropriate boxes)—

(a) Sole owner-operator of the farm ☐.

(b) Joint owner-operator with ..... (Name) ..... (Address) ☐.

(c) Hired manager for ..... (Name) ..... (Address) ☐.

(d) Cash tenant or renter ☐
(e) Standing rent tenant ☐
(f) Share cropper ☐
(g) Share tenant ☐
My agreement with ..... (Name of landlord)
expires ..... (Month) (Day) (Year)

(h) Wage hand (hired man) ☐
(i) Unpaid family worker ☐
..... (Name and address of employer)

2. I have been engaged in farm work continuously since ..... (Date) 3. I ..... (do, do not) live on the farm where I work.

4. I ..... (am, am not) actually and personally responsible for the operation of the farm where I work.

5. The principal crops and livestock of the farm I operate or work on are:

Names of Crops	Acres Devoted to Each	Kinds of Livestock	Number of Each Now on Farm

6. Total value of products sold from this farm during the last crop year $ .....

7. Principal products marketed during the last two years .....

8. The number of year-round workers on this farm is ..... (Number) of whom ..... (Number) are hired hands.

9. I am paid at the rate of $ ..... per hour ☐; day ☐; week ☐; month ☐.
(Check appropriate box)

10. Other facts which I consider necessary to present fairly the farming or farm work I have described and my connection with it as a ground for classification are (if none, write "None") .....

11. Other business or work in which I am now engaged .....
(Nature of business; if none, write "None")

12. Prior work experience .....

NOTE.—You may attach to this page a statement giving any additional information which you think the local board should consider in determining your classification, which statement will then become a part of this question-

[fol. 606]

Series X.—EDUCATION

1. I have completed Eight (Number) years of elementary school, 2 (Number) years of junior high school, and 2 (Number) years of high school.
2. I was (was, was not) graduated from high school.
3. I have had the following schooling other than elementary and high school (if none, write "None"):

Name of College, University, Preparatory, Trade or Business School	Course of Study	Length of Time Attended, Degrees or Certificates Granted
Home Study	Commercial Art -	
Nutritional Science	Nutritional Science	

Series XI.—STUDENTS

INSTRUCTIONS.—Every registrant who is a full-time high school or college student, except those who have completed Series VI above, shall complete this series. A student who believes that he should be placed in a deferred class because of his student status should file with the local board the necessary supporting evidence.

1. (*a*) I am a full-time student at ..... (Name of institution)

located at ....., majoring in .....

preparing for ..... (Occupation or profession)

(*b*) I expect to receive from this institution a ..... (Kind of certificate, diploma, or degree (if none, write "None"))

on ..... (Date)

(*c*) I intend to take an examination for license in ..... (Profession) (If none, write "None") on ..... (Date)

Series XII.—CITIZENSHIP

INSTRUCTIONS.—Every registrant shall complete the statements numbered 1, 2, 3, and 4 in this series. Every registrant who is not a citizen of the United States shall also complete the statement numbered 5 when applicable.

1. I was born at Detroit (Town or county) Michigan (State) USA (Country) on 12-19-29 (Date)
2. My race is White ☒; Negro ☐; Oriental ☐; Indian ☐; Other ☐ ..... (specify)
3. I am a citizen or subject of United States (Country)
4. I ..... (have, have not) filed a Declaration of Intention to become a citizen of the United States.
5. I filed my Declaration of Intention at ..... (City) (State) on ..... (Month) (Day) (Year) under No. .....

Series XIII.—COURT RECORD

INSTRUCTIONS.—Every registrant shall complete this series.

1. I have been convicted of crimes, other than minor traffic violations, as recorded below; if none, write "None." List all convictions, last conviction first.

Offense	Date of Conviction (Month, Day, Year)	Court (Name and Location)	Sentence
(Last conviction) None			

2. I AM NOT (am, am not) now being retained in the custody of a court of criminal jurisdiction, or other civil authority.

Specify .....

[fol. 607]

222

Series XIV.—CONSCIENTIOUS OBJECTION TO WAR

INSTRUCTIONS.—Any registrant who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form shall sign the statement below requesting a Special Form for Conscientious Objector (SSS Form No. 150) from the local board.

By reason of religious training and belief I am conscientiously opposed to participation in war in any form and for this reason hereby request that the local board furnish me a Special Form for Conscientious Objector (SSS Form No. 150) which I am to complete and return to the local board for its consideration.

(Registrant)

Series XV.—PHYSICAL CONDITION

INSTRUCTIONS.—Every registrant shall complete this series. Any registrant who answers any of the questions listed below by "Yes" and who believes himself physically disqualified for service in the Armed Forces may attach an affidavit from his physician, hospital, or sanatorium to support his claim.

1. Do you have any physical or mental condition which, in your opinion, will disqualify you from service in the Armed Forces? Yes ☐; No ☒.
2. If the answer to Question 1 is "Yes," state the condition from which you are suffering

.....

3. Are you now, or have you ever been, an inmate or a patient in a mental hospital or institution? Yes ☐; No ☐.
4. Are you now, or have you ever been, an inmate or a patient in a tuberculosis hospital or sanatorium? Yes ☐; No ☐.
5. If the answer to Question 3 or Question 4 is "Yes," give the name and address of each hospital, institution, or sanatorium

.....

6. Have you had treatment from a physician for any condition within the last 5 years? Yes ☐ No ☐
7. If the answer to Question 6 is "Yes," state each condition from which you suffered and give the name and address of the physician who attended you, and dates of each treatment

.....

REGISTRANT'S STATEMENT REGARDING CLASSIFICATION

INSTRUCTIONS.—It is optional with registrant whether or not he completes this statement, and failure to answer shall not constitute a waiver of claim to deferred or other status. The local board is charged by law to determine the classification of the registrant on the basis of the facts before it, which will be taken fully into consideration regardless of whether or not this statement is completed.

In view of the facts set forth in this questionnaire it is my opinion that my classification should be Class 1A.

The registrant may write in the space below or attach to this page any statement which he believes should be brought to the attention of the local board in determining his classification.

.....

REGISTRANT'S CERTIFICATE

INSTRUCTIONS.—1. Every registrant shall make the registrant's certificate. 2. If the registrant cannot read, the questions and his answers thereto shall be read to him by the person who assists him in completing this questionnaire. 3. If the registrant is unable to sign his name he shall make his mark in the space provided for his signature in the presence of two persons who shall sign as witnesses.

NOTICE.—Imprisonment for not more than five years or a fine of not more than $10,000, or both such fine and imprisonment, is provided by law as a penalty for knowingly making or being a party to the making of any false statement or certificate regarding or bearing upon a classification. (Selective Service Law of 1948.)

I, Carlin Evans, certify that I am the registrant named and described in the foregoing statements in this questionnaire; that I have read (or have had read to me) the statements made by and about me, and that each and every such statement is true and complete to the best of my knowledge, information, and belief. The statements made by me in the foregoing are in my own handwriting.

(Here sign or mark)

Registrant sign here ➤ Carlin Evans

(Signature or mark of registrant)

(Signature of witness to mark of registrant)

(Signature of witness to mark of registrant)

If another person has assisted the registrant in completing this questionnaire, such person shall sign the following statement:

I have assisted the registrant herein named in preparation of this questionnaire because

.....

(Reason registrant could not complete questionnaire)

[fol. 608]

(Registrants Will Make No Entries on This Page)

Dates	Minutes of Actions by Local Board and Appeal Board	Vote Yes	Vote No
7/11/50	1 A ff	2	0
JUL 14 1950	Form 110 mailed		
10/27/50	2A RSL	2	0
NOV 2 1950	Form 110 mailed		
11/7/51	1 A ff	3	0
NOV 8 1951	Form 110 mailed		
11-13-51	Form SSS 150 [illegible]		
Dec. 11, '51	SSS Form 150 mailed(new Revised edition.) hn		
Dec. 17, '51	Form 150 received completed. hn		
1/9/52	1 A-C ff	3	0
JAN 10 1952	Form 110 mailed		
Jan. 22, '52	Letter of Appeal and personal appearance received hn		
1/28/52	Case re-viewed not re-opened ff	3	0
1-28-52	Board agreed to personal appearance at next Form 150 meeting on		
2-?-52	Letter written to report for personal appearance 2-11-52. ll		
2/27/52	2 A for 6 months ff	2	0
FEB 28 1952	Form 110 mailed		
9/24/52	Letter received from National Steel and Shipbuilders hn	2	0
SEP 25 1952	FORM 110 MAILED		
OCT 3 1952	Letter of Appeal received hn		
10/8/52	2A 6 mo mm	2	0
OCT 16 1952	Form 110 mailed		
OCT 16 1952	FORM 111 MAILED.		
1/7/53	1 A ff	3	0
JAN 8 1953	Form 110 mailed		
JAN 15 1953	SSS FORM 223 MAILED		
[illegible] 19, '53	Letter of Appeal received hn Appeal dated Jan. 15, 1953		
[illegible]-21-53	Case re-viewed not re-opened ff	3	0

224
[Fol. 609]

Dates	Minutes of Actions by Local Board and Appeal Board	Vote Yes	Vote No
1-22-53	C-140 mailed to registrant hh		
JAN 23 1953	File forwarded to Board of Appeal hh		
2-16-53	DD Form 62 mailed Acceptable hh		
4-13-54	File returned from board of Appeal hh Class I-A Vote	3	0
APR 1 1954	110 mailed hh		
MAY 4 1954	SSS FORM 252 MAILED		
May 20,'54	Refused induction		
May 26,'54	Reg. ordered in for informal interview on June 3, 1954.		
June 3,1954	Registrant appeared for informal interview, additional information placed in registrant's file. A.W.S.		
6-18-54	File forwarded to SHQ hh		
8-11 54	File returned from SHQ hh		
SEP 9 1954	Complete file and SSS Form 1 mailed to SHQ for Photostating hh		
9-20-54	Entire file and SSS Form No. 1, returned from SHQ hh		
7-11-55	File and SSS Form 1 received from So. Area Hdqs. hh		
9/1/55	1 A	3	0
SEP 2 1955	FORM 110 MAILED		
OCT 28 1955	SSS FORM 252 MAILED		
Nov. 8,1955	Failed to report for induction		
Nov. 25, 1955	File forwarded to SHQ, OB 105		
Dec.21,1955	File returned to L.B. From SHQ. hh		
Jan. 3, 1956	SSS Form 301 mailed to United States Attorney hah		
MAR 16 1956	C1 DEK	3	0
MAR 19 1956	Complete File and Registration Card forwarded to SHQ. hh		
MAR 23 1956	Complete file and registration card returned from SHQ hh		
SEP 24 1956	Duplicate Forms SSS No. 2, Reg. Cert. and SSS Form 110, Notice of Cl...		
AUG 27 1957	File and Registration card forwarded to State Director hh		
Sept. 24, 1957	File and Registration Card returned from State Director		

[fol. 610]

Dates	Minutes of Actions by Local Board and Appeal Board	Vote Yes	Vote No
1-22-53	C-140 mailed to registrant hh		
JAN 23 1953	File forwarded to Board of Appeal hh		
2-16-53	DD Form 62 mailed Acceptable hh		
4-13-54	File returned from board of Appeal hh Class I-A Vote	3	0
APR 1 1954	110 mailed hh		
MAY 4 1954	SSS FORM 252 MAILED		
May 20,'54	Refused induction		
May 26,'54	Reg. ordered in for informal interview on June 3, 1954.		
June 3,1954	Registrant appeared for informal interview, additional information placed in registrant's file. F.W.S.		
6-18-54	File forwarded to SHQ hh		
8-11-54	File returned from SHQ hh		
SEP 9 1954	Complete file and SSS Form 1 mailed to SHQ for Photostating hh		
9-20-54	Entire file and SSS Form No. 1, returned from SHQ hh		
7-11-55	File and SSS Form 1 received from So. Area Hdqs. hh		
9/1/55	1 A 21	~3-0	
SEP 2 1955	FORM 110 MAILED		
OCT 28 1955	SSS FORM 252 MAILED		
Nov. 8,1955	Failed to report for induction		
Nov. 25, 1955	File forwarded to SHQ, OB 105		
Dec.21,1955	File returned to L.B. From SHQ. hh		
Jan. 3, 1956	SSS Form 301 mailed to United States Attorney hah		
APR 16 1956	C1 PCK	4	0
MAR 19 1956	Complete File and Registration Card forwarded to SHQ. hh		
MAR 23 1956	Complete file and registration card returned from SHQ hh		
SEP 24 1956	Duplicate Forms SSS No. 2, Reg. Cert. and SSS Form 110, [illegible]		
AUG 27 1957	File and Registration card forwarded to State Headquarters hh		
Sept. 24, 1957	File and Registration Card returned from [illegible]		
JUL 30 1958	File forwarded to State Headquarters hh		

To be used to provide a record of actions of SSS Boards and of Appeal Boards

SSS Form No. 102-B

[fol. 610]

SELECTIVE SERVICE SYSTEM—CLASSIFICATION QUESTIONNAIRE
MINUTES OF ACTION—CONTINUED

NAME OF REGISTRANT	SELECTIVE SERVICE NO.
VENUS, Carlin Constantine	110 29

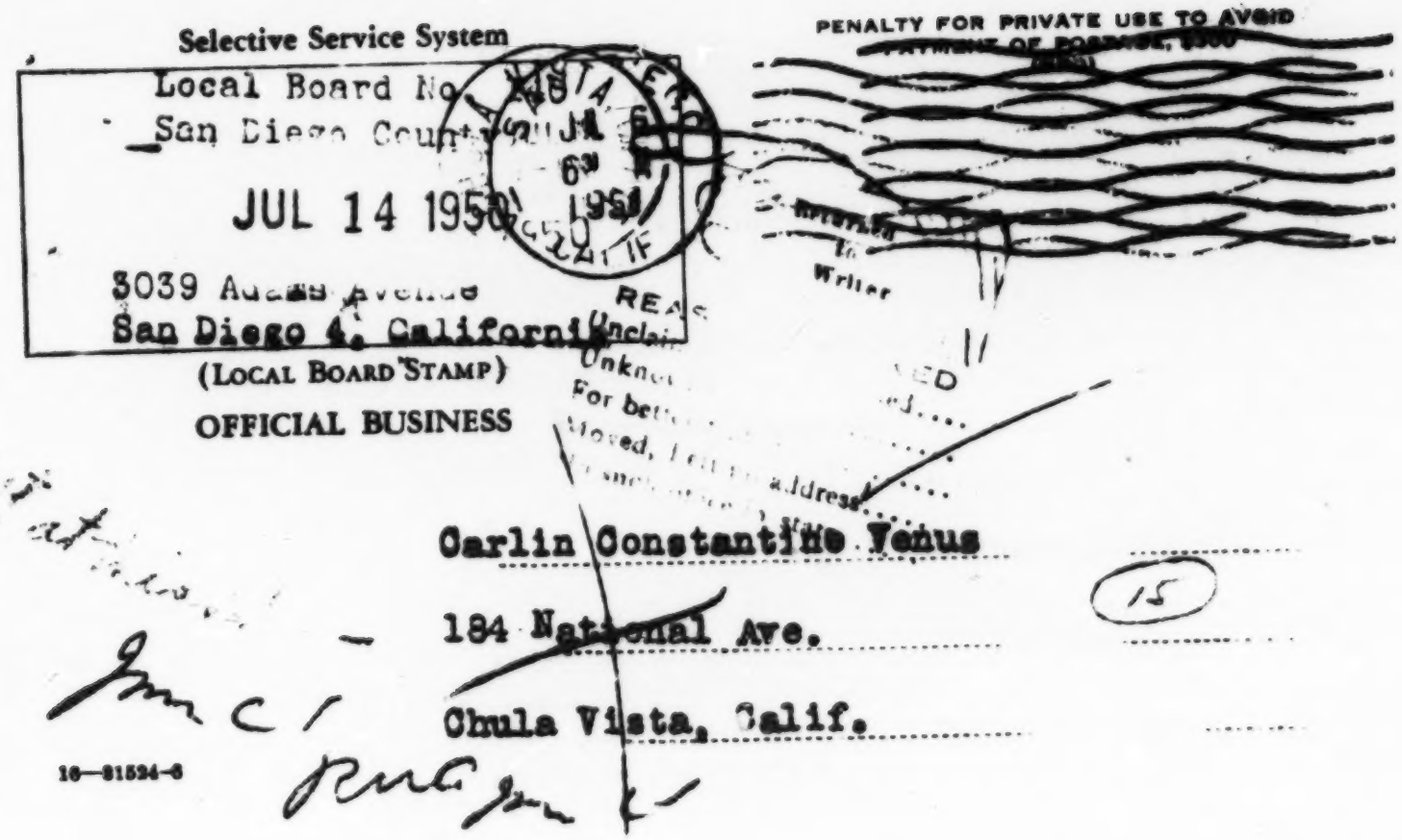
Dates	Minutes of Actions by Local Board, Appeal Board, and on Appeal to the President	Vote Yes No
AUG 4 1958	File returned from SHC hh	
AUG [illegible] 1959	File forwarded to SHQ for Photostating at the Request of U.S. Atty.	
AUG 24 1959	File returned with Photostats from SHQ	
Nov.19,1959	Certificate for Pioneer Minister received	

[Fol. 611]

MICRO CARD
TRADE MARK ®

MATTHEW BENDER & COMPANY

- 61



Selective Service System

Local Board No. [illegible]

San Diego County [illegible]

JUL 14 1950

3039 Adams Avenue

San Diego 4, California

(LOCAL BOARD STAMP)

OFFICIAL BUSINESS

PENALTY FOR PRIVATE USE TO AVOID PAYMENT OF POSTAGE, $300

Carlin Constantine Venus

184 National Ave.

Chula Vista, Calif.

15

16—81524-6

NOTICE OF RIGHT TO APPEAL

Appeal from classification by local board must be made within 10 days after the mailing of this notice by filing a written notice of appeal with the local board.

Within the same 10-day period you may file a written request for personal appearance before the local board. If this is done, the time in which you may appeal is extended to 10 days from the date of mailing of a new Notice of Classification after such personal appearance.

If an appeal has been taken and you are classified by the appeal board in either Class I-A or Class I-A-O and one or more members of the appeal board dissented from such classification you may file a written notice of appeal to the President with your local board within 10 days after the mailing of this notice.

Cut along this line to detach card

Cut along this line

SELECTIVE SERVICE SYSTEM Approval of Budget Bureau not required

NOTICE OF CLASSIFICATION

Venus Carlin Constantine

(Last name) (First name) (Middle name)

Selective Service No. 4 140 29 578

has been classified in Class 1-A (Until .....,

19.....) by ☑ Local Board, ☐ Appeal Board,

by vote of ..... to ..... ☐ President

(Show vote on appeal board cases only)

JUL 14 1950, 19.....

(Date of mailing) (Member of local board)

(Registrant must sign here)

The law requires you, subject to heavy penalty for violation, to carry this notice, in addition to your Registration Certificate, on your person at all times—to exhibit it upon request to authorized officials—to surrender it, upon entering the armed forces, to your commanding officer.

For advice, see your Government appeal agent.

The law requires you: (1) To keep in touch with your local board; (2) to notify it of any change of address; (3) to notify it of any fact which might change your classification; (4) to comply with the instructions on the notice of classification part of this form.

SSS Form No. 110 (Revised 4-15-49)

Cut along this line to detach card

16—31524-6 U. S. GOVERNMENT PRINTING OFFICE

Appeal Board for the Selective Service System in the Southern Federal Judicial District of the State of California

SELECTIVE SERVICE SYSTEM

MAR 29 1954

Approval of Budget Bureau not required

LOCAL BOARD NO. 140
San Diego County
JAN 23 1953
Room 222, 525 E Street
San Diego, California

1206 S. SANTEE STREET
LOS ANGELES 15, CALIF.

INDIVIDUAL APPEAL RECORD

Name of registrant VENUS (Last) CARLIN (First) CONSTANTINE (Middle)

Selective Service Number 4 | 140 | 29 | 578

Appeal [illegible] Selective Service System in the Southern Federal Judicial District of the State of California

JAN 26 19[illegible]

1206 S. SANTEE STREET
LOS ANGELES 15, CALIF.

Classified by local board in Class I-A until , 194

Date classified January 7, 1953, 194

☒ Forwarded on appeal taken by Registrant

Date forwarded to Appeal Board , 194

Helen A. Hausch
Member or Clerk of Local Board

Appeal Board for the Selective Service System in the Southern Federal Judicial District of the State of California Panel No. 3.

MINUTES OF ACTION BY APPEAL BOARD

LOCAL BOARD NO. 140
San Diego County
APR 13 1954
Room 205, 1215 7th Ave.
San Diego 1, California

Appeal Board [illegible] for the State of

1206 S. SANTEE STREET
LOS ANGELES, CALIFORNIA

Classified in Class 1-A until , 1954, by the following vote:

Yes 3 No 0

4-9-54
(Date of classification by Appeal Board)

D. A. Bartman
Member or Clerk of Appeal Board.

INSTRUCTIONS.—The local board will prepare this form in duplicate. The original will be stapled or otherwise securely fastened to the inside of the front cover of the registrant's SSS Form No. 1 (Classification Questionnaire), and the copy will be retained in the local board office in the Registrant's Cover Sheet and attached to the charge-out card.

Form No. 120

U. S. GOVERNMENT PRINTING OFFICE 16-47468-4

[fol. 614]

Exhibit

Approval of Budget Bureau not required

SELECTIVE SERVICE SYSTEM

ORDER TO REPORT FOR INDUCTION

LOCAL BOARD NO. 140
San Diego County
MAY 4 1954
Room 205, 1215 7th Ave.
San Diego 1, California

(LOCAL BOARD DATE STAMP WITH CODE)

MAY 4 1954
(Date of mailing)

The President of the United States,

To Carlin (First name) Constantine (Middle name) VENUS (Last name) 4 140 29 578 (Selective Service Number)

650 - 11th Street
(Street and number)

San Diego (City) Calif. (State)

GREETING:

Having submitted yourself to a Local Board composed of your neighbors for the purpose of determining your availability for service in the armed forces of the United States, you are hereby ordered to

report to the Local Board named above at Greyhound Bus Depot, Traveler's Aid Desk
[illegible] Broadway, San Diego, Calif.
(Place of reporting)

at 6:30 a m., on the 19 day of May, 1954, for
(Hour of reporting)
forwarding to an induction station.

This Local Board will furnish transportation to the induction station where you will be examined, and, if accepted for service, you will then be inducted into a branch of the armed forces.

Persons reporting to the induction station in some instances are found to have developed disqualifying defects since being examined and may be rejected for these or other reasons. It is well to keep this in mind in arranging your affairs, to prevent any undue hardship if you are rejected at the induction station. If you are employed, you should advise your employer of this notice and of the possibility that you may not be accepted at the induction station. Your employer can then be prepared to replace you if you are accepted, or to continue your employment if you are rejected.

If you are not accepted, return transportation will be provided.

Willful failure to report promptly to this Local Board at the place specified above and at the hour and on the day named in this notice is a violation of the Selective Service Act of 1948, and subjects the violator to fine and imprisonment.

You must keep this form and bring it with you when you report to the Local Board. Failing with you [illegible] thing for 3 days.

If you are so far removed from your own Local Board [illegible] compliance with this Order will be a serious hardship and you desire to report to a Local Board in the area [illegible] are now living, or [illegible] Local Board and make written request for transfer of your delivery [illegible] Selective Service System.

230 [fol. 615] EXHIBIT

20 May 1954

"I refuse to be inducted into the Armed Services of the United States".

/s/Carli Venus

Witnessed by:

Earl S Beydler, Capt., Inf
C J Gissell, M/Sgt US Army

A TRUE COPY:

EARL S BEYDLER
Captain Inf

[fol. 616]

EXHIBIT

June 7 - 54

Local Board 140
Fox Theatre Bldg Rm 7
1215 7th Avenue
San Diego, Calif.

LOCAL BOARD NO. 140
San Diego County
JUN 7 1954
Room 205, 1215 7th Ave.
San Diego 1, California

Dear Sir - Ladies and Gentlemen

At this time I wish to inform you of my departure from San Diego to Modesto, Calif. Reason for leaving employment - I received Notice of Investigation & have notified, when in Los Angeles after induction procedure. (Home employ) My new address is 1431 10th St. Modesto, Calif, but can be reached within one or two days, at my San Diego address.

Thanking all of you,

I remain respectfully,
Carlos Ramos

[fol. 617]

232

EXHIBIT

Orlie Kenna
450 10th St.
San Diego -

LOCAL BOARD NO. 140
San Diego County

JUN 7 1954

Room 205, 1215 7th Ave.
San Diego 1, California

26006

Local Board 140
San Diego Co
1215 7th Ave
San Diego
Calif -2

[fol. 618]
[fol. 619]

Approval not required

SELECTIVE SERVICE SYSTEM

ORDER TO REPORT FOR INDUCTION

LOCAL BOARD NO. 140
Fox Theatre Bldg., Room 205
1215 - 7th Avenue
San Diego 1, California

(LOCAL BOARD STAMP)

OCT 28 1955

(Date of mailing)

The President of the United States,

To Carlin (First name) Constantine (Middle name or initial) Venus (Last name) 4 140 29 578 (Selective Service Number)

Mailing address 1431 10th Street, (Number and street or R. F. D. route)

Modesto, (City, town, or village) (Zone) California (County) (State)

GREETING:

Having submitted yourself to a Local Board composed of your neighbors for the purpose of determining your availability for service in the Armed Forces of the United States, you are hereby ordered to report to the Local Board named above at Greyhound Bus Depot, Traveler's Aid Desk (Place of reporting) First & Broadway, San Diego, Calif.

at 6:30 a. m., on the 8th of November 1955, for forwarding to an induction station.

(Hour of reporting) (Day) (Month)

Joseph [illegible] (Member or clerk of Local Board)

IMPORTANT NOTICE

If you have had previous military service, bring your service records with you. If you wear glasses, bring them with you.

This Local Board will furnish transportation to the induction station where you will be examined, and, if accepted for service, you will then be inducted into a branch of the Armed Forces. If you are not accepted, return transportation will be provided.

Persons reporting to the induction station in some instances are found to have developed disqualifying defects since being examined and may be rejected for these or other reasons. It is well to keep this in mind in arranging your affairs, to prevent any undue hardship if you are rejected at the induction station. If you are employed, you should advise your employer of this notice and of the possibility that you may not be accepted at the induction station. Your employer can then be prepared to replace you if you are accepted, or to continue your employment if you are rejected.

Willful failure to report promptly to this Local Board at the place specified above and at the hour and on the day named in this Order is a violation of the Universal Military Training and Service Act, as amended, and subjects the violator to fine and imprisonment. You must keep this form and bring it with you when you report to the Local Board. Bring with you sufficient clothing for 3 days.

If you are so far removed from your own Local Board that reporting in compliance with this Order will be a serious hardship and you desire to report to a Local Board in the area in which you are now located, go immediately to that Local

234 [fol. 620]

EXHIBIT

ORDER TO REPORT FOR INDUCTION

LOCAL BOARD NO. 140
Fox Theatre Bldg., Room 205
1215 - 7th Avenue
San Diego 1, California
(LOCAL BOARD STAMP)

OCT 28 1955
(Date of mailing)

The President of the United States,

To Carlin (First name) Constantine (Middle name or initial) Venus (Last name) 4 240 29 578 (Selective Service Number)

Mailing address 1431 10th Street, (Number and street or R. F. D. route)

Modesto, (City, town, or village) (Zone) California (County) (State)

GREETING:

Having submitted yourself to a Local Board composed of your neighbors for the purpose of determining your availability for service in the Armed Forces of the United States, you are hereby ordered to report to the Local Board named above at Greyhound Bus Depot, Traveler's Aid Desk (Place of reporting) First & Broadway, San Diego, Calif.

at 6:30 a. m., on the 8th of November 1955, for forwarding to an induction station.
(Hour of reporting) (Day) (Month)

Joseph Lucero
(Member or clerk of Local Board)

IMPORTANT NOTICE

If you have had previous military service, bring your service records with you. If you wear glasses, bring them with you.

This Local Board will furnish transportation to the induction station where you will be examined, and, if accepted for service, you will then be inducted into a branch of the Armed Forces. If you are not accepted, return transportation will be provided.

Persons reporting to the induction station in some instances are found to have developed disqualifying defects since being examined and may be rejected for these or other reasons. It is well to keep this in mind in arranging your affairs, to prevent any undue hardship if you are rejected at the induction station. If you are employed, you should advise your employer of this notice and of the possibility that you may not be accepted at the induction station. Your employer can then be prepared to replace you if you are accepted, or to continue your employment if you are rejected.

Willful failure to report promptly to this Local Board at the place specified above and at the hour and on the day named in this Order is a violation of the Universal Military Training and Service Act, as amended, and subjects the violator to fine and imprisonment. You must keep this form and bring it with you when you report to the Local Board. Bring with you sufficient clothing for 3 days.

If you are so far removed from your own Local Board that reporting in compliance with this Order will be a serious hardship and you desire to report to a Local Board in the area in which you are now located, go immediately to that Local Board and make written request for transfer of your delivery for induction, taking this Order with you.

SSS Form No. 252 (Revised 1-23-53) (Supplies of previous printings shall be used until exhausted) 16-65418-2 U. S. GOVERNMENT PRINTING OFFICE

234 [fol. 620] EXHIBIT

SELECTIVE SERVICE SYSTEM

DELINQUENT REGISTRANT REPORT

LOCAL BOARD NO 140
Fox Theatre Bldg. Room 205
1215 - 7th Avenue
San Diego 1, California
(Local Board Stamp)

JAN 3 1956

TO: Hon. Loughlin B. Waters, ...ates Attorney
600 Federal Bldg., 312 So. Spring St., Los Angeles 12, California
(Address)

1. IDENTIFICATION OF DELINQUENT:

Full name of delinquent:
VENUS, Carlin Constantine
(Last) (First) (Middle)

Last known address:
1431 10th Street, Modesto, Calif.
(Number and street or R. F. D. route) (City, town, or village) (Zone) (County) (State)

Selective Service No.:	Social Security No.:	Selective Service classification:
4 140 29 578	370 26 4427	I-A

Color of eyes:	Color of hair:	Complexion:	Height:	Weight:	Race:
Brown	Brown	Ruddy	5'10½"	195	White

Other obvious physical characteristics:
Scar on each side of neck

Date of birth:	Place of birth:
December 19, 1929 (Month) (Day) (Year)	Detroit, Michigan (City, town, county)

Prior military service:
None
(Branch of Armed Forces) (Service or serial number) (Date of ...)

(Name of last organization) (Date of separation)

This delinquent has a court record as follows:

Offense	Date of Conviction (Month, day, year)	Court (Name and location)	Sentence
None			

2. OFFENSES:

This delinquent failed to report for induction into the Armed Forces pursuant to (check applicable box):

☒ Order to Report for Induction (SSS Form No. 252).

☐ Order for Transferred Man to Report for Induction (SSS Form No. 253).

The order indicated was mailed on October 28, 1955 (Date of mailing) to this delinquent at 1431 10th Street, Modesto, Calif. (Address) to report on November 8, 1955 (Date)

In addition to failing to report for induction into the Armed Forces this delinquent has also failed to perform the following duties at the times indicated:

DUTIES	DATES
Refused Induction	May 19, 1954

[fol. 621]

EXHIBIT

8. EFFORTS MADE TO LOCATE DELINQUENT

The delinquent **has** (Has, has not) been located on **Oct. 28, 1955** (Date) at **1431 10th St. Modesto, Calif.** (Address)

The person who will always know the delinquent's address is **John Vemo, 18h National Ave.,** (Name) **National City, Calif.** (Address) This person **has not** (Has, has not) been contacted by

..... (Letter, telephone, in person) on ..... (Date) with the following result

.....

The delinquent's last known place of employment or business is **Dennis Construction Co.** (Name) **Harold Morrison, Jr. Modesto, Calif.** (Address) His employer **has not** (Has, has not) been contacted by

..... (Letter, telephone, in person) on ..... (Date) with the following result

.....

4. Mail directed to the delinquent **is not** (Is, is not) returned by the post office

5. REMARKS: (Include additional efforts to locate delinquent or names of individuals who may know whereabouts of the delinquent.)

[fol. 629]

6. FUTURE INFORMATION:

You will be advised promptly by letter of any change in this delinquent's status and of any additional facts which may come to the attention of this board concerning his whereabouts or which may aid you in apprehending and prosecuting him.

Helen A. Lynch
(Member or clerk of local board)

This form will be used in making report to the United States Attorney of delinquents, who fail to report for induction. Other delinquencies, if reported to the United States Attorney, will be reported by letter.

This form will be made out in triplicate. The original and first copy of the form shall be sent to the United States Attorney for the judicial district in which the local board is located. One copy of the form shall be filed in the Cover Sheet (SSS Form No. 101) of the delinquent.

16—64535-1 U. S. GOVERNMENT PRINTING OFFICE

[fols. 633 and 634]

LOCAL BOARD NO. 140
San Diego County

AUG 2[illegible] 1956

Room 205, 1215 7th Ave.
San Diego 1, California

Carlin Venus
766 Pier Ave. #1
Santa Monica, Calif.
August 21, 1956

Local Board #140
Fox Theater Bldg.
Room 205, 1215 7th Ave.
San Diego 1, California

Re: # 4-140-29-678

Dear Sirs:

Referring to my last letter to you dated and mailed April 9,1956, I received no reply. Among other information presented in said letter was a request which is as follows..."Please send my latest classification and any other information of which I should be aware.

This will be my last letter to you unless future circumstance requires correspondence.

Pertaining to the above mentioned, please consider.

Sincerely,

Carlin Venus
Ordained Minister of God

P.S. In connection with previous adress. I mailed a card to you with my address as ... 1120 30th St. San Diego, Calif. at the start of last year.

Copies mailed to AssIT U. S. Attorney
and FBI this date-- 8/27/56

[fol. 623]

Exhibit

After Five Days Return to
Carlin Venus

956 Pier Avenue #1
[redacted]
Santa Monica, California

LOCAL BOARD NO. 140
Selective Service
ROOM 205, 1215 7th AVE.
San Diego California

RECEIVED
675

LOCAL BOARD NO. 140
San Diego County
AUG 22 1956
Room 205, 1215 7th Ave.
San Diego 1, California

VENICE AUG 21 1956 CALIF.

SAN DIEGO AUG 22 1956 CALIF.

VENICE AUG 21 1956 CALIF.

[fol. 625]
[fol. 626]

HRB:cw

23886-SD

LOCAL BOARD No. 140
San Diego County
AUG 30 1956
Room 205, 1215 7th Ave.
San Diego 1, California

August 29, 1956

Mr. Carlin Vemms
746 Pier Avenue No. 1
Santa Monica, California

Dear Mr. Vemms:

A copy of your letter dated August 21, 1956, addressed to Local Board 140, Selective Service System, San Diego, California, was referred to this office.

The matter of certain delinquencies by you in connection with your duties under the Selective Service Law has been referred to this office for prosecutive opinion. These delinquencies refer to your failure to keep the Selective Service Board advised of your present address and also your failure to report for induction as ordered on October 28, 1955.

Very truly yours,

LAUCHLIN E. WATERS
United States Attorney

HOWARD R. HARRIS
Assistant United States Attorney

Copy: Local Board 140
San Diego, California

Copy: FBI San Diego

240

[fols. 627 and 628]

EXHIBIT

[fol. 629]

EXHIBIT

Carlin C. Venus
756 Peir Ave. Apt. 1
Santa Monica, Calif.

THIS SIDE OF CARD IS FOR ADDRESS

POSTAL CARD

Local Board # 140
Fox Theater Bldg.
Room 205, 1215 7th Ave.
San Diego, Calif.

Sept. 1, 1956

Dear Sirs:

The contents of my wallet in [illegible] card was stolen just recently. Please send me a duplicate copy of my draft card.

The number of registration: 4-140-29-578

LOCAL BOARD NO. 140
San Diego County

Sincerely yours,

Carlin C. Weems/

Room 208, [illegible] Ave.
San Diego 1, California

Carlin C. Weems

[illegible]
[illegible]
7[illegible] Pier Avenue
[illegible] Monica [illegible] California

[illegible] [illegible] HRR:ow
23886-SD

Local Board 140
1215 7th Avenue
Room 205
San Diego 1, California

Dear Sirs:

It is my understanding that I am required to keep you informed where mail can reach me. I did inform you of my San Diego address where my parents lived first at 650 11th Street and I informed you when they moved to 1120 30th Street. They phoned immediately when any information was received regarding my draft situation, as I had asked them to do so.

I also have a photostatic copy of my file up to the date of January [illegible] before me. It includes a letter to you dated June 7, 1954 stating that could be reached within one or two days at my home address in San Diego. In February, 1955 I sent you a post card stating that all mail was to be sent to my new home address, 1120 30th Street, San Diego. This was mailed from a Los Angeles Post Office, and I have a witness to the fact that I did mail it.

When the U. S. Marshall's Office notified my parents at home they telephoned at once. All mail sent to my home address was sent immediately to me until April 9, 1956 when I wrote you of my new home address as 7[illegible] Pier Avenue, Santa Monica, California.

I have always complied with all the instructions of the Board. Never have I tried to avoid any duty by means of trickery. Therefore, I honestly object to your conclusion that I have been deliquent in advising the Board of my home address. I concealed nothing and refused induction openly, because of being conscientiously opposed to combatant and noncombatant service as an ordained minister, on May 20, 1954. I reported at the Induction Station because of receiving mail at my home address in San Diego. I definitely did not receive any other induction notice, and if I did, I would have reported as before.

After openly appearing at the Marshall's Office I was put on bail [illegible] in August, 1955 my case was completely thrown out of court as a case in the Supreme Court had been won that had bearing on my case.

Very truly yours,

[illegible]

Carlin C. Venus

cc: U. S. Attorney
San Diego 1, California

[fols. 631 and 632]

EXHIBIT

rlin C. Venus
56 Pier Avenue
nta Monica, California

VENICE
SEP 4
4 PM
1956
CALIF.

[redacted]

LOCAL BOARD NO. 140
San Diego, California

Room 205
San Diego 1, California

CERTIFIED MAIL
No 750154

Local Board #140
1725 7th Avenue
Room 205
San Diego 1, California

RETURN RECEIPT REQUESTED

[fol. 635]
IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 16961

CARLIN CONSTANTINE VENUS, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the Southern District of California, Southern Division.

[fol. 636] Before:

Barnes & Jertberg, Circuit Judges, and Boldt, District Judge.

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
October 4, 1960

Ordered appeal herein argued by Mr. Hayden C. Covington, counsel for the Appellant, and by Mr. Minoru Inadomi, Assistant U. S. Attorney, counsel for the Appellee, and submitted to the Court for consideration and decision.

[fol. 637]
IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Before:

Barnes and Jertberg, Circuit Judges, and Boldt, District Judge.

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINIONS AND FILING AND RECORDING OF JUDGMENT—December 24, 1960

Ordered that the typewritten opinion, and dissenting opinion of Jertberg, Circuit Judge, this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the majority opinion rendered.

[fol. 638]

IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 16,961

CARLIN CONSTANTINE VENUS, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

On Appeal from the United States District Court for the Southern District of California, Southern Division.

OPINION—December 24, 1960

Before:

Barnes and Jertberg, Circuit Judges; and Boldt, District Judge.

BARNES, Circuit Judge:

Appellant appeals from a judgment of conviction for knowingly failing and neglecting to keep the local draft board advised of the address where mail would reach him at all times. The indictment charged an offense in violation of Title 50 Appendix U.S.C.A. § 462.[1]

[fol. 639] Jurisdiction of the district court was invoked under the provisions of Title 18 U.S.C.A. § 3231 and Title 50 Appendix U.S.C.A. § 462. Jurisdiction of this court to re-

[1] Title 50 Appendix, U.S.C.A. § 462 provides in relevant part as follows:

"(a) Any • • • person charged as herein provided with the duty of carrying out the provisions of this Title [Sections 451-470 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty • • • shall upon conviction in any District Court of the United States of competent jurisdiction, be punished by imprisonment of not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. • • • "

view the appeal from the judgment rests on the provisions of Title 28 U.S.C. §§ 1291 and 1294.

In order to review at least one of the questions presented on this appeal it is necessary to briefly summarize some of the past history of appellant's entanglement with the provisions of the Universal Military Training and Service Act. Appellant registered with the Local Board No. 140 in San Diego County, California, on September 15, 1948. During the years 1950 and 1951 appellant was classified at various times in classifications I-A and III-A. On November 19, 1951, appellant returned to the local board a completed conscientious objector form, in which he claimed that he was, by reason of his religious training and belief, conscientiously opposed to participation in war in any form and claimed exemption from both combatant and noncombatant service. During the years 1952 and 1953 appellant was at various times classified in classifications I-A-O, II-A and I-A. Thereafter appellant remained classified or reclassified I-A, this last classification being on September 1, 1955, following an unsuccessful appeal by the appellant to the appeal board. On September 2, 1955, notice of classification was sent to the appellant at Modesto, California, which appellant claimed he never received. Such claim was advanced by appellant in the prosecution of the first indictment returned against the appellant. On October 28, 1955, the local board ordered appellant to report for induction on November 8, 1955, which order to report was likewise sent to Modesto, California, which was likewise claimed by appellant to have never been received.

Appellant failed to report for induction on November 8, 1955, and on August 8, 1957, appellant was charged by indictment with the offense of failing to report for induction on November 8, 1955, at San Diego, California. Following trial of that offense to a jury, appellant was convicted, and appealed from the judgment of conviction to this court. The judgment of conviction was reversed by this court in *Venus* v. *United States*, 9 Cir., 1959, 266 F.2d 386. Following such reversal the offense in the indictment was tried twice to a jury, resulting in each case in a mistrial because [fol. 640] of failure to reach a verdict in each case on the part of each jury.

On December 23, 1959, a two-count indictment was returned against the appellant. The first count of this new indictment charged appellant with the offense of failing to perform a continuing duty to report for induction in April 1956. The second count of the new indictment charged that appellant was a person within the class made subject to Selective Service under the Universal Military Training and Service Act; that he registered as required by said Act and the regulations thereunder, and became a registrant of local board No. 140; and that he "thereafter had a duty to keep said board advised at all times of the address where mail would reach him; that on or about February 1, 1955 . . . the defendant, Carlin Constantine Venus, knowingly failed and neglected to perform said duty required of him under said Act and the regulations promulgated thereunder, in that he knowingly failed and neglected to keep said board advised of the address where mail would reach defendant."

The offenses charged in the two indictments—the failure to report for induction on November 8, 1955, alleged in the first indictment returned on August 8, 1957, and the two offenses—the failure to perform a continuing duty to report for induction in April 1956, and the failure to keep the local draft board notified where mail would reach appellant at all times—set forth in the indictment returned on December 23, 1959, were consolidated for trial. The case was tried to a jury in May of 1960. Following deliberations of three days, the jury returned a verdict finding appellant guilty on the second count contained in the second indictment. The jury reported that it was unable to agree on the offense set forth in the first indictment, and on count one of the second indictment. Thereafter the trial court dismissed the first indictment and the first count of the second indictment sua sponte "in the interests of justice, on the ground that there had been now four trials." Appellant was committed to custody for three years, and ordered to pay a fine of $500.00.

On December 29, 1959, the appellant moved the district court to dismiss the indictment returned on December 23, 1959, against appellant, on the ground that the delay of appellee in returning the indictment charging appellant [fol. 641] with failure to keep the local draft board advised

at all times of an address where mail would reach him deprived appellant of his right to a speedy trial, as guaranteed by the Sixth Amendment to the Constitution of the United States. This motion was denied by the district court.

One of appellant's specifications of error on this appeal is that the district court committed reversible error in so doing. We will consider this assignment of error before proceeding to the other points involved in the review of this appeal.

The indictment returned against appellant on December 23, 1959, alleged that the offense set forth in the second count was committed on or about February 1, 1955. Hence the indictment was returned within the five-year period of limitations specified by Title 18 U.S.C.A. § 3282.[2] Trial on this offense commenced on May 5, 1960, and was concluded May 14, 1960, which was less than five months from the date of the return of the indictment.

Appellant concedes "there are a large number of cases that hold that a prosecution is not barred by the statute of limitations so long as it is brought within the five-year statutory period. The courts have held that limitation does not apply even if the indictment is delayed to near the end of the five-year period." (Appellant's Opening Brief, p. 54.) Mindful of the above stated concession, appellant contends that the delay of appellee in causing appellant to be indicted was violative of the speedy trial provisions of the United States Constitution. No claim is advanced by appellant that he was arrested, detained or held in custody on the offense charged in count two of the indictment prior to the return of the indictment. In short, appellant's argument is that he should have been sooner indicted. We find no merit in this contention. As stated in *Parker* v. *United States*, 6 Cir., 1958, 252 F.2d 681, *cert. denied* 356 U.S. 963:

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[2] "§ 3282. Offenses not capital. Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed. As amended Sept. 1, 1954, c. 1214, § 10 (a), 68 Stat. 1145."

> "The provisions of the Sixth Amendment guaranteeing a speedy trial to anyone charged with an offense, contemplate a pending charge and not the mere possibility of a criminal charge."

[fol. 642] See also *D'Aquino* v. *United States*, 9 Cir., 1951, 192 F.2d 338, *rehearing denied* 203 F.2d 390, *cert. denied* 345 U.S. 935 (1952), in which this court stated, at page 350:

> "Appellant, however, says that her military detention in Japan in the year following October 1945, demonstrates that she was denied a speedy trial. We shall have occasion to refer to the character of the detention later in this opinion, but wholly apart from whether that detention was or was not in accordance with law, it has no bearing whatever upon the question of her right to a speedy trial, which is one that arises after a formal complaint is lodged against the defendant in a criminal case."

Appellant's reliance on *United States* v. *Provoo*, D.Md. 1955, 17 F.R.D. 183, *affirmed* 350 U.S. 857 (1955), and *Taylor* v. *United States*, D.C.Cir., 1956, 238 F.2d 259, is completely misplaced. In the *Provoo* case the defendant was arrested on a formal charge in September 1949, but was not indicted in the proper district until October of 1954. In the *Taylor* case the indictment was returned on February 23, 1954, and trial did not commence until March 28, 1956. It clearly appears in the *Taylor* case that the defendant in no manner waived his right to a speedy trial.

Before proceeding further we will briefly summarize the evidence which was before the jury relevant to the offense for which appellant was convicted.

When appellant registered with his local draft board in San Diego County, he gave as his mailing address 184 National Avenue, Chula Vista, California. The clerk of the local board testified that at some time prior to June 7, 1954, appellant gave as an address where he could always be reached the address of his parents, which was 650 Eleventh Street, San Diego, California. On July 14, 1950, notice of classification was mailed to appellant at the address at 184

National Avenue, Chula Vista, California, but was returned to the local board marked "Moved, left no address." Between that date and June 7, 1954, appellant notified the local board of change of address on five separate occasions, the last change of address prior to June 1954 being 650 Eleventh Street, San Diego, California. On June 7, 1954, appellant filed with the local draft board a letter in which [fol. 643] he stated: "At this time I wish to inform you of my departure from San Diego to Modesto, Calif. because of secular employment. The Federal Bureau of Investigation I have notified, when in Los Angeles after induction procedures. My new address is (Same employer) 1431 10th St. Modesto, California, but can be reached within one or two days, at my San Diego address." The return address given on the envelope enclosing the letter was 650 Eleventh Street, San Diego. The letter with envelope attached is in the draft board files. The draft board file of appellant is contained within three cover sheets which on the outside show the many notifications of changes of address by appellant. One of these cover sheets, following the listing of the Modesto address, contains the notation in red pencil "(see letter attached)". The other two cover sheets contain no such notation. The explanation given by the clerk of the board for the presence of three cover sheets was that new cover sheets are used when the old cover sheets become "dog-eared." Appellant lived at Modesto, California, from June 7, 1954, to February 7, 1955, on which date he moved to Los Angeles County. No changes of addresses were received by the local board from the appellant for the period from June 7, 1954, to the end of 1955. Following appellant's return to Los Angeles County from Modesto, he moved from one address to another on five or six occasions but did not notify the local draft board of any of said addresses because said addresses were temporary. Appellant testified that in the middle of February 1955, his parents moved from 650 Eleventh Street to 1120 Thirtieth Street, San Diego. Appellant's father testified that he left a forwarding address with the San Diego Post Office, but appellant did not file any forwarding address with the Post Office in this instance. Appellant testified that on or about February 19, 1955, he deposited a government post card in the United States Post Office at Los Angeles, addressed to his

local board, notifying the board that his address had been changed to 1120 Thirtieth Street, San Diego, California. Appellant's draft board file does not reveal the receipt of this card by the draft board. It appears from the record that in February 1955, and for some months prior thereto, the Selective Service file of appellant was out of the possession of the local board and in the hands of the Selective Service officials in Los Angeles. A dummy file was used by the [fol. 644] clerk of the local board during this period. The clerk of the local board testified that if the card had been received it would have been placed in appellant's file. On September 2, 1955, there was mailed to the appellant by the local board notification of his I-A classification, addressed to 1431 Tenth Street, Modesto, California. On October 28, 1955, the local draft board mailed to appellant at the Modesto address an order dated October 28, 1955, to report for induction at San Diego on November 8, 1955. The envelopes containing the notice of classification and the order to report for induction contained the return address of the local board, but neither letter was ever returned to the local board. The appellant testified that he never received either the notice of classification or the order for induction. No notices were sent by the draft board to appellant at any other address.

It should be borne in mind that we are not considering any offense charged against the appellant except that on which appellant was convicted, to-wit, that appellant knowingly failed and neglected to keep the local board advised of the address where mail would reach him. Section 1641.3 of the Selective Service Regulations[3] places the duty on each registrant to keep the local board advised at all times of the address where mail will reach him.

The validity of Section 1641.3 of the Regulations was upheld by the Supreme Court of the United States in *Bartchy*

---

[3] Section 1641.3 of the Selective Service Regulations (32 C.F.R. § 1641.3) reads as follows:

"Communication by Mail.—It shall be the duty of each registrant to keep his local board advised at all times of the address where mail will reach him. The mailing of any order, notice, or blank form by the local board to a registrant at the address last reported by him to the local board shall constitute notice to him of the contents of the communication, whether he actually receives it or not."

v. *United States*, 319 U.S. 484, in which opinion the following interpretative language appears (at 488):

> "We think the Government correctly interprets the Act, § 11, and the regulation, § 641.3 not to require a registrant who is expecting a notice of induction to remain at one place or to notify the local board of every move or every address, even if the address is temporary. * * * The regulation, it seems to us, is satisfied when the [fol. 645] registrant, in good faith, provides a chain of forwarding addresses by which mail, sent to the address which is furnished the board, may be by the registrant reasonably expected to come into his hands in time for compliance."

We will now consider appellant's assigned error "that the district court erred in failing to grant appellant's motion for judgment of acquittal made at the close of all the evidence, and renewed after the verdict of the jury."

Under this point, the appellant states:

> "The gist of the argument under this point is—
>
> "(1) The indictment charged appellant with the offense of failing to keep his local board informed as to where mail would reach him on February 1, 1955, and as a matter of fact on such date mail would have reached him at Modesto, California;
>
> "(2) Appellant at all times had in his draft board file a letter written in June of 1954 that informed the local board of an address in San Diego where he could always be reached by mail."

In light of our review of the evidence in this case and the interpretative language in *Bartchy*, we are convinced that the trial court was correct in the denial of the appellant's motion. Section 1641.3 of the Regulations requires a registrant to keep his local board *advised at all times* of the address where mail will reach him. Count two of the second indictment returned against the appellant limited the appellant's duty to "on or about February 1, 1955." During the course of the trial, the district court, in its rulings on

the admission of evidence and in its instructions to the jury, held that proof of the offense *at any time during the month of February 1955 would support the charge in the indictment.*[4] It is necessary for us to pass upon the correctness [fol. 646] of such rulings and instructions. We find no error in them.[5]

---

[4] "Now this indictment alleges that this occurred on or about February 1, 1955. The proof that you heard on that encompasses a period not earlier than February 1, 1955 and running up to February 20th or 21st, 1955, and the Government is making no contention that if Mr. Venus mailed the change of address on February 20th or 21st, whatever the date was he claimed he mailed it, that that was too late. The Government's contention is that he didn't mail it.

"So therefore this count is going to concern solely that simple issue, was that notice mailed sometime in February? It doesn't make any difference when it was mailed in February, if it was mailed. It is just about that simple. The Government doesn't have to prove the exact date. The Government alleges that the defendant did not do this act on or about the 1st of February. But the proof, as I say, encompasses a period that runs on up to the 20th. . . ." (Tr. p. 508.)

• • •

"But you are not concerned with what particular date that card was mailed in February, because the Court has already instructed you that the area covered in the evidence, sometime between the first and the 21st, is close enough to the charge in the indictment and is a close enough time for the defendant's mailing the change of address card." (Tr. p. 518.)

[5] See *United States* v. *Tramaglino*, 197 F.2d 928, 932, *cert. denied* 344 U.S. 864. There the Court said: "Our decision in *United States* v. *Wilson*, 2 Cir., 154 F.2d 802, 805, requires only 'substantial similarity' between the indictment dates and those brought out in trial; all the versions here were within a few weeks of one another and of the indictment dates." In the *Wilson* case cited in *Tramaglino*, the indictment charged that a conversation material to the offense occurred on or about July 20. The Court held that even if the conversation actually occurred on or around September 1, as defendant's analysis of the evidence indicated, the act proved was not too remote to support the indictment.

A variance between what is charged in the indictment and what is proved is not material or prejudicial unless it involves elements of surprise that would hamper defendant's efforts to prepare their defense. *United States* v. *Ragen*, 314 U.S. 513, 526.

It is undisputed that appellant remained in Modesto until February 8, 1955. We might assume, although there is no proof of the fact, that mail directed to appellant by the local draft board during *the early days* of February to the Modesto address would have reached him. We cannot assume that mail directed by the local draft board during the month of February, but after the early days thereof, to the appellant at the Modesto address would have reached him. No mail was directed to him by the local draft board at the Modesto address at any time during the month of February 1955. In fact, no mail was directed to him at the [fol. 647] Modesto address by the local board until September 1955, some six months later. In the letter of June 7, 1954, in which appellant advised the local draft board of the new Modesto address, he stated that his employer was the same as one previously reported to the draft board, "but [I] can be reached within one or two days at my San Diego address." The cover sheet of appellant's draft board file shows that appellant's address at the time that appellant furnished to the draft board the Modesto address was 650 Eleventh Street, San Diego, California. Therefore, when the draft board received the letter, it had knowledge of that San Diego address. But that address was not *then* the address of the parents. No change in the parents' address had been given the board.

The record shows that the Modesto address was the sixth change of address which appellant furnished to his local draft board. The record further discloses many other communications from appellant to the draft board from the date of his registration to his last change of address, and several personal appearances before the board, all of which disclose his understanding of the duty placed upon him by law. The voluminous record before the draft board discloses that appellant was persistent and determined in his efforts to resist the 1-A classification and to keep alive and exhaust his administrative remedies, up until February 1955. After that time he no longer complied with the law with which he was so familiar.

Appellant had a simple duty to perform—to keep his local draft board advised at all times where mail would reach him. This he failed to do. Two letters addressed to appellant at

the last address he had given the board were never returned to the board, yet appellant claimed he had not received them. The postcard appellant says he mailed to the board was never delivered to it. While there is a conflict in the testimony, the jury had the right and did choose to believe appellant's failure to advise the draft board of his change of address was knowingly and wilfully done. The question of appellant's truthfulness and good faith was a question of fact for the jury's determination. The address given as that of appellant's parents, "where he could always be reached," was not accurate; no new address was given to the board, either by appellant or his parents, when the [fol. 648] latter moved. That appellant had, on six previous occasions, advised the board of a change of address proves nothing that is of aid to appellant—it merely proves that he, with complete knowledge and understanding of his obligation and duty under a law (the provisions of which were thoroughly familiar to him), knowingly violated that law for a period of eighteen months, from early June 1954 to the end of 1955. (Section 1641.3 of the Selective Service Regulations (32 C.F.R. § 1641.3).) Appellant had a continuing duty during that eighteen month period to give the board accurate information as to where he could be reached.

To shift the blame for appellant's failure to follow the law to the board by claiming that but one of the three covers sheets had the notation "(see letter attached)", and that therefore there was no proof appellant could not have been reached at such address because no letters were sent to the parents' address, is beside the point. The address so given was *not* the parents' address "at all times" during the eighteen months' failure by appellant to furnish his own address, nor "on or about February 1st, 1955." Appellant was not required by law to furnish his address to the local board only if that board might have letters it wanted to mail him—but *at all times*.

In the opinion of the jury, in which we join, this appellant had not met the test laid down in *Bartchy* v. *United States*, *supra*, that a registrant must "in good faith provide a chain of forwarding addresses by which mail, sent to the address which is furnished the board, may be by the regis-

trant reasonably expected to come into his hands in time for compliance." In *Bartchy*, the registrant, a seaman, had relied on the regular procedure of his Maritime Union (procedures which had been effective in the cases of other registrants), but which there failed because of "a mistake of the official of the Union."

In *Ward* v. *United States*, 5 Cir., 1952, 195 F.2d 441, the appellate court refused to disturb the verdict of the jury convicting defendant. But there Ward had given to the local board, on its questionnaire, the address of his employer as well as his residence address. Ward moved from his residence address without notifying the board, relying on the business address which remained "good" and at which Ward had proved he did receive mail. This business address the board did not attempt to use, despite Selec-[fol. 649] tive Service Regulations requiring them to do so. Section 1642.41.(b) of Selective Service Regulations. See note 1 of *Ward* v. *United States*, *supra*. The Supreme Court in a *per curiam* opinion without discussing the facts held the record did not support the charge "of a deliberate purpose to violate the law." Thus, the facts differ. (344 U.S. 924 (1935).)

Here the evidence is such that a trier of fact could well believe that no good faith existed on the part of Venus with respect to his continuing duty between June 7, 1954, and early 1956 to inform the board; and that he had knowingly and with deliberate purpose violated the law. That factual finding implicit in the jury's verdict is binding on this court, in the absence of error. We cannot hold the jury's verdict erroneous as a matter of law.

The judgment is *affirmed*.

JERTBERG, Circuit Judge (dissenting):

I am unable to agree with the conclusion reached in the majority opinion that the trial court did not err in failing to grant appellant's motion for judgment of acquittal made at the close of all of the evidence and renewed after the verdict of the jury. In *Bartchy* v. *United States*, 319 U.S. 484, the Supreme Court stated that the regulation which placed upon appellant the duty to keep his local draft board

advised at all times of the address where mail would reach him "is satisfied when the registrant, in good faith, provides a chain of forwarding addresses by which mail, sent to the address which is furnished the board, may be by the registrant reasonably expected to come into his hands in time for compliance." The crucial period in this prosecution, as stated in the trial court's instructions to the jury, is the month of February 1955. The letter of June 7, 1954, directed by the appellant to the draft board, and quoted in the majority opinion, stated that appellant's employer was the same one as the one previously reported to the draft board, and that appellant could be reached "within one or two days" at his San Diego address. The letter was enclosed [fol. 650] in an envelope which bore the return address of 650 - 11th Street, San Diego, California, which appellant had previously furnished to the draft board. This address was also the address of appellant's parents, which had been furnished to the draft board long prior to June 7, 1954 as an address where appellant could always be reached. The clerk of the local draft board testified that the appellant had given his parents' address as the place where he could always be reached. The clerk further testified that the appellant was specifically requested not only to give the address where he lived or resided but also to give a reference of someone—his parents in this case—who would know his address or through whom mail would reach him. The clerk further testified that the return address on the outside of the envelope referred to the address of appellant's parents. In explaining why the notation "see letter attached" was made on the cover sheet of appellant's draft board file opposite appellant's Modesto address, the clerk stated "I made that entry for the simple reason that if any mail were returned to us from the Modesto address that I would look for and try and contact him through his San Diego address." No notices were sent by the local draft board to the appellant at either the Modesto or the San Diego address during the month of February 1955. The record is likewise clear that no effort was made by the draft board at any time to contact appellant's parents or his employer. In fact, no mail was directed by the local draft

board to the appellant until September 1955. It is undisputed that appellant's parents remained at 650 - 11th Street, San Diego, California, until the middle of February 1955, at which time they moved to 1120 - 30th Street, San Diego, at which time they furnished to the San Diego Post Office the latter address as the place where mail should be forwarded. It appears clear to me that notice directed to the appellant at 650 - 11th Street, San Diego, California, during the month of February 1955 would have come into the hands of the appellant, notwithstanding the fact that appellant's parents moved to a new address about the middle of February. Also, in my view, it is pure speculation to assume that mail directed to the appellant at the Modesto address during the month of February 1955 would not have come into the hands of the appellant.

I am convinced that the evidence in this case meets the test laid down in *Bartchy*, and that appellant, in good faith, [fol. 651] provided a chain of forwarding addresses by which mail sent to the address which appellant furnished the board could be by the appellant reasonably expected to come into his hands in time for compliance. I would reverse the judgment of conviction.

[File endorsement omitted]

[fol. 652]

IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 16961

CARLIN CONSTANTINE VENUS, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

JUDGMENT—Filed and entered December 24, 1960

Appeal from the United States District Court for the Southern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the

Southern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

[File endorsement omitted]

[fol. 653]

IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 16961

[Title omitted]

ORDER ON PETITION FOR REHEARING—February 2, 1961

Before:

Barnes and Jertberg, Circuit Judges, and Boldt, District Judge.

For the reasons set forth in the majority opinion, the petition for rehearing is denied. The suggestion for a rehearing en banc is rejected.

Stanley N. Barnes, Circuit Judge.

I concur:

George H. Boldt, District Judge.

I dissent, and vote to grant the petition for rehearing for the reasons set forth in my dissenting opinion. I reject the suggestion that a rehearing en banc be had.

Gilbert H. Jertberg, Circuit Judge.

[fol. 654] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 655]

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1960

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—February 23, 1961

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 3, 1961.

Wm. O. Douglas, Associate Justice of the Supreme Court of the United States.

Dated this 23rd day of February, 1961.

[fol. 656]

SUPREME COURT OF THE UNITED STATES

No. 865, October Term, 1960

CARLIN CONSTANTINE VENUS, Petitioner,

vs.

UNITED STATES.

ORDER ALLOWING CERTIORARI—May 15, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1960

No. ~~[illegible]~~ 75

CARLIN CONSTANTINE VENUS, Petitioner

v.

UNITED STATES OF AMERICA

Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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Supreme Court of the United States

OCTOBER TERM, 1960

No.

CARLIN CONSTANTINE VENUS, Petitioner

v.

UNITED STATES OF AMERICA

Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue in this case to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the Southern District of California convicting the petitioner for a violation of the Universal Military Training and Service Act.

OPINION BELOW

The opinion of the Court of Appeals has not yet been reported. It is printed, *infra*, pages 21 to 35, as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on December 24, 1960. See Appendix B, *infra*, page 36. A petition for rehearing was timely filed in the court below and it was denied on February 2, 1961. See Appendix C, *infra*, page 37. An application for extension of time was duly made. On February 23, 1961, the time for filing this petition was extended to April 3, 1961, by an order made by Mr. Justice Douglas. See Appendix D, *infra*, page 38.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P. Title 18, Section 3231, U. S. C. confers jurisdiction on the trial court.

QUESTIONS PRESENTED

I.

Whether the conviction based on an indictment that under the court's charge limited the offense (of failing to keep petitioner's local board informed as to where mail would reach him) to the month of February, 1955, should have been reversed because the draft board record showed that during such time mail would have reached him at either Modesto, California, or San Diego, California.

II.

Whether the conviction based on an indictment that under the court's charge limited the offense (of failing to keep petitioner's local board informed as to where mail would reach him) to the month of February, 1955, should have been reversed because the draft board record showed there was on file a letter written in June of 1954 that in-

formed the local board not only of the Modesto address but also of petitioner's permanent San Diego address, where mail would always reach him.

III.

Whether the conviction should have been reversed because the motion to dismiss the indictment was improperly overruled by the trial court since petitioner was denied rights of a speedy trial guaranteed by the Sixth Amendment to the United States Constitution by the Government through deliberate and extraordinarily long delay in bringing the last count of the second indictment accusing petitioner with failing to keep the local board advised of an address where mail would reach him following one appeal and three trials of the original indictment charging petitioner with failure to report for induction, which first indictment was dismissed by the trial court on the last trial.

IV.

Whether the trial court committed reversible error in refusing to give petitioner's requested instructions numbers 45 and 46, which put to the jury petitioner's theory concerning the mailing of the card at Los Angeles in February, 1955, notifying the local board of his return from Modesto to San Diego.

STATUTE INVOLVED

Section 12(a) of the Universal Military Training and Service Act (50 U. S. C. App. § 462(a)) provides:

> "• • • Any • • • person • • • who • • • refuses • • • service in the armed forces • • • or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title • • • shall upon conviction in any district court of the United States of competent juris-

diction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. * * *"

REGULATIONS INVOLVED

Section 1602.4 of the Selective Service Regulations (32 C.F.R. § 1602.4) reads as follows:

> *"Delinquent.*—A 'delinquent' is a person required to be registered under the selective service law who fails or neglects to perform any duty required of him under the provisions of the selective service law."

Section 1641.3 of the Selective Service Regulations (32 C.F.R. § 1641.3) reads as follows:

> *"Communication by Mail.*—It shall be the duty of each registrant to keep his local board advised at all times of the address where mail will reach him. The mailing of any order, notice, or blank form by the local board to a registrant at the address last reported by him to the local board shall constitute notice to him of the contents of the communication, whether he actually receives it or not."

Section 1642.1 of the Selective Service Regulations (32 C.F.R. § 1642.1) reads as follows:

> *"Regulations Governing Delinquents.*—Delinquents, as defined in section 1602.4 of this chapter shall be governed by the provisions of this part and such other provisions of the Selective Service Regulations as are not in conflict therewith."

Section 1642.2 of the Selective Service Regulations (32 C.F.R. § 1642.2) reads as follows:

> *"Continuing Duty.*—When it becomes the duty of a registrant or other person to perform an act or furnish

information to a local board or other office or agency of the Selective Service System, the duty or obligation shall be a continuing duty or obligation from day to day and the failure to properly perform the act or the supplying of incorrect or false information shall in no way operate as a waiver of that continuing duty."

STATEMENT OF THE CASE

Petitioner seeks review of the judgment of the United States Court of Appeals for the Ninth Circuit, affirming a judgment of the United States District Court for the Southern District of California. (See Appendix B, *infra*, at page 36.) The judgment of the district court was entered after trial by jury finding petitioner guilty of failing to keep the local board advised as to where mail would reach him, in violation of the Universal Military Training and Service Act.[1]

This case has a long history. (See *Venus* v. *United States*, 266 F. 2d 386 (9th Cir. 1959).) Petitioner was charged by indictment on August 8, 1957, with only one offense, that of failing to report for induction on November 8, 1955, at San Diego, California. (TR 2; SM 40-42) He pleaded not guilty to this indictment and during November, 1957, he was convicted of that offense and appealed to the Court of Appeals. The Court of Appeals reversed the conviction because of errors committed by the trial court in charging the jury and in refusing to grant certain requested instructions upon the law and the facts.—266 F. 2d 386 (Jan. 8, 1959).

Following the reversal of the conviction the original

[1] There is no printed record in this case because of the speed of submission demanded by the Court of Appeals. Time was not allowed to print the record. Pursuant to the rules of the court below the case was ordered submitted on typewritten record and typewritten briefs. Numbers appearing herein within parentheses and preceded by "TR" refer to pages of Transcript of Record. Numbers appearing herein within parentheses and preceded by "SM" refer to pages of the official Reporter's Transcript of Proceedings.

indictment was tried twice to a jury, resulting on each occasion in a mistrial because of a hung jury.

The Government, as an afterthought following the third trial, procured a second indictment containing two counts on December 23, 1959. The first count of this new indictment charged petitioner with the offense of failing to perform a continuing duty to report for induction in April of 1956. The second count charged petitioner with the offense of failing on or about February 1, 1955, to keep his local board notified of an address "where mail" would reach him at all times. (TR 4; SM 41-43) He was not indicted with failing to perform a continuing duty after February, 1955. The commission of the offense was limited to "on or about" February 1, 1955. See pages 29-30, *infra*.

Petitioner duly filed a motion to dismiss the second indictment because of the long delay of the Government in bringing the two counts of the second indictment so as to deny his right to a speedy trial guaranteed by the Constitution. (TR 7-21; SM 13-17)

The case (two indictments containing one and two counts respectively) proceeded to trial before a jury on May 5, 1960. (SM 3) The evidence was concluded on May 10, 1960. Petitioner made an extensive motion for judgment of acquittal at the close of all the evidence. (SM 440-449) The trial court denied the motion for judgment of acquittal. (SM 449) The case was then argued to the jury on May 11, 1960. The charge to the jury by the court began on May 11 and was concluded on May 12, 1960. The jury was kept by the court to deliberate for three days and finally reached a verdict late on Saturday afternoon, May 14, 1960. (TR 171)

The verdict rendered by the jury found petitioner guilty on only one count, the last count of the second indictment. The jury reported that it was unable to agree on the first indictment and on count one of the second indictment. (SM 572) The trial court discharged the jury as to the first indictment and the first count of the second indictment. (SM 573)

Petitioner renewed his motion for judgment of acquittal promptly after the verdict on count two of the second indictment. (SM 576-577) The trial court, over the objection of the district attorney, dismissed the first indictment and the first count of the second indictment on its own motion "in the interests of justice, on the ground that there have been now four trials." (SM 578) The trial court then overruled the motion for judgment of acquittal as to the second count of the second indictment and held that there was some evidence to support the jury's verdict on the last count of the second indictment. (SM 579-582)

Petitioner was sentenced to the custody of the Attorney General for a period of three years and ordered to pay a fine in the amount of $500. (TR 196; SM 592-593) He duly appealed to the Court of Appeals, which affirmed the conviction, as above shown.

The draft board file of petitioner (except for certain excluded parts) was received into evidence as Government's Exhibit 1. (SM 112, 131) Such file is contained in three cover sheets, which, on the outside, show the many notifications of changes of address by petitioner. (SM 132-140) The three different cover sheets were used by the local board as the basis of addressing cards and letters to the petitioner. (SM 138-139)

Entries on the cover sheet (part of Government's Exhibit 1) under "CHANGES OF ADDRESS:" are numbered, and they were based upon communications received from the petitioner by the board, indicating various changes of address as to where mail would reach him. The cover sheet appearing in Government's Exhibit 1 shows that petitioner notified the local board of six separate changes of address before October, 1955, when the order commanding him to report for induction issued. The local board received and made entries on the cover sheet of the six letters or cards received by it showing changes of address.

Entry number 6 of a change of address that was recorded by the local board on the cover sheet shows a letter

was received from petitioner dated June 7, 1954. Such letter appearing in the file reads as follows:

"At this time I wish to inform you of my departure from San Diego to Modesto, California, because of secular employment. The Federal Bureau of Investigation I have notified when in Los Angeles after induction procedures. My new address is (Same employer) 1431 Tenth Street, Modesto, Calif., *but can be reached within one or two days, at my San Diego address.*" (SM 141, 206)[2]

Upon receipt of this letter by the local board in June of 1954 entry number 6 on the cover sheet under the heading "CHANGES OF ADDRESS:" was made. The entry reads as follows: "1431 - 10th St. 6-7-54, Modesto, Calif. (See letter inside)." (SM 140) The longhand notation "(See letter inside)" for emphasis by the board was written in red on the original cover sheet. (SM 140) The clerk of the local board testified the one and only reason that she made the entry on the outside of the cover sheet opposite item number 6 under the heading "CHANGES OF ADDRESS:" was because, if petitioner could not be reached at the Modesto, California, address, the local board would "look for or try and contact him through his San Diego address." (SM 141)

The clerk of the board said that the board had been notified by petitioner that he had given his parents' San Diego address previously to the order to report and to the letter of June, 1954, as the place where he could always be reached. (SM 142) The clerk testified that Venus was specifically requested, not only to give the address where he lived or resided, but also to give a reference of someone—his parents in this case—who would know his address or through whom mail would reach him. (SM 143)

[2] Emphasis is added to show that the local board never failed to know where petitioner could be reached. Also undisputed evidence shows petitioner was then out on bond pending a trial in Los Angeles of an indictment charging a violation of an earlier order to report for induction.

The clerk testified that the statement appearing in the letter from Venus dated June 7, 1954, "but can be reached within one or two days, at my San Diego address," referred to the address of Venus' parents. This address was written on the outside of the envelope in which the letter came to the board as the *return address* of petitioner. This envelope was attached to the letter dated June 7, 1954, appearing in the file. (SM 143-144) Such envelope showed the return address of Venus as 650 11th Street, San Diego. (SM 144) This is the same address that was recorded on the cover sheet under the heading "CHANGES OF ADDRESS:" and listed as item number 5. See Government's Exhibit 1.

The clerk testified that Venus had furnished the local board with the 650 11th Street, San Diego, address as his parents' address, where he could always be reached long previous to writing the letter of June 7, 1954. (SM 144)

Venus lived at Modesto, California, from June, 1954, to February 7, 1955, on which date he moved to Los Angeles to work at various places in Los Angeles County. (SM 208-209, 234-237, 252, 272, 279-281) On February 1, 1955, the date charged in the indictment, mail admittedly would have reached him at Modesto.

On moving to Los Angeles Venus worked as a tree cutter for one week and afterward he went to San Diego to help his parents move from 650 11th Street to 1120 30th Street, San Diego. He said all his addresses in Los Angeles were temporary. (SM 10, 238, 275, 290) He helped his parents to move his permanent residence from one address to another on a weekend that was in the middle of February. (SM 238, 275)

The father of Venus testified that promptly after making this move of the permanent address of petitioner he—the father—left a forwarding address with the San Diego Post Office, which notified that office that he had moved from 650 11th Street to 1120 30th Street, San Diego, which then was the permanent address of petitioner.

Venus returned to Los Angeles after helping his parents move and resumed his work as a tree cutter. (SM 209) Thereafter he had many temporary Los Angeles addresses. (SM 210, 218, 256)

On or about February 19, 1955, after his return from San Diego, petitioner deposited a government post card in the United States Post Office at Los Angeles addressed to his local board, which was several months before the order to report was mailed, as appears below. (SM 210-213, 219) He testified that this card was mailed, as above stated, after he had helped his parents move to 1120 30th Street, San Diego. (SM 213-216) He also testified that the card notified the board of the 1120 30th Street address in San Diego. (SM 255, 261, 276-277)

In the same mail, according to undisputed testimony, Venus deposited a letter properly stamped and addressed to Bertha Leonard in San Diego that enclosed a postal money order that was received by her in due course of the mails. (SM 255, 261, 276-277, 279-281)

Long after Venus had moved from Modesto and notified his board that he had changed his address back to San Diego it prepared and mailed to him at the Modesto address an order to report for induction dated October 28, 1955, commanding him to report for induction at San Diego in November, 1955. (SM 119-120) The order was placed in an envelope addressed to 1431 10th Street, Modesto, California, and not to the permanent San Diego address shown in the communication of June, 1954, to the board. (SM 120-122) One of the three cover sheets showing the 1431 10th Street, Modesto, California, address was used in the preparation of the order and the envelope in which it was mailed. (SM 132-133) It was obviously one of the several cover sheets that failed to show the words: "See letter inside" that identified the San Diego address.

The order to report for induction was never received by Venus at his San Diego address. There may have been several reasons. One: the building at the Modesto address

where he lived and worked was torn down in April of 1955 and thereafter no longer existed and did not exist in October of 1955. Two: Venus had not left a forwarding address from the Modesto address back to his San Diego address at the post office in Modesto. (SM 219, 253, 283) The reason for this omission was that petitioner assumed the local board had received the card showing a change of address that he mailed to the local board from Los Angeles in February of 1955, the same as it had received five other such notices and, because of this belief, did not leave a forwarding address with the post office in Modesto, especially since he had notified the board in June of 1954 of the address of his parents in San Diego as a place where mail would always reach him. (SM 253, 255, 261)

Venus testified, however, that had mail been received by his former employer, Morrisson, in Modesto he would have forwarded it to Venus at San Diego at any time through the month of April, 1955. (SM 252-254) Even after Venus left Modesto there was mail from the United States Marshal pertaining to his court appearances in Los Angeles which was received by him through his parents' San Diego address when addressed to it as he had notified the board to do but which it did not do. (SM 264-266)

The local board admittedly never attempted to locate Venus at the San Diego address because the draft board mail that had been sent to him at the Modesto, California, address had never been returned to the local board by the post office. (SM 144-145, 151, 162-163, 164-165)

In February of 1955 when the card was mailed by Venus to the local board notifying it of the change of address, admittedly the draft board file was out of the possession of the board in San Diego. Is had been admittedy for months in the hands of Selective Service officials in Los Angeles so that it could be used in connection with a proposed trial of Venus for an earlier refusal to comply with an order of the local board issued in 1954. (SM 174) The card mailed by Venus in February of 1955 notifying the board of a change

of address was not placed in the draft board file and may have been misfiled because of the absence of the file and the use of the dummy files by the clerk of the local board if it were received. This statement is based on the testimony of the clerk who testified she did not remember receiving the change of address card only because it could not be found in the file. She had no recollection independent of this failure to find the card. (SM 174-186)

The clerk testified also that Venus had always been very prompt and regular in notifying the local board about any communication from the board or about any change in address. (SM 165) She testified the board had been informed that Venus' parents would at all times know his address and know how to locate him. (SM 163)

Venus did not learn of the existence of the October, 1955, order to report for induction until April, 1956, when he was interviewed by an F.B.I. agent. (SM 220, 222, 224) He wrote the local board after the interview with the F.B.I. agent, who failed to advise what to do except for Venus to write the board, which he did, but he received no answer to his letter to the board as to what to do. (SM 226) The local board then made a notation, however, of his new address at 756 Pier Avenue, Santa Monica, California, on April 10, 1956, and later, on November 15, 1956, noted another change of address to 302 Market Street, Venice, California. All of these many notices, seven or eight in all, were long before the indictment charging Venus with a failure to keep the local board informed of a place where mail would always reach him during February, 1955, which time was a mere short interval between many notices and was also eight months before the board mailed the order to report in the latter part of October of 1955. See the cover sheets, Government's Exhibit 1.

For a briefer statement of the facts see the dissenting opinion of Judge Jertberg, at pages 33 to 35. Compare the statement in the opinion of the majority of the court below at pages 26 to 28.

REASONS FOR GRANTING THE WRIT

I.

The court below held that no error was committed by the trial court in overruling the motion for judgment of acquittal. The undisputed evidence showed that petitioner did not willfully and knowingly fail to keep his local board advised at all times of the place where mail would reach him. The evidence wholly failed to show any willful and knowing violation of the law. The evidence was as consistent with innocence as it was with guilt. The draft board file showed two addresses where mail could reasonably be expected to reach petitioner at all times during the month of February, 1955.

The holding of the court below upon the record in this case is out of harmony with and diametrically opposed to *Ward* v. *United States*, 344 U. S. 924 (1953) (reversing *Ward* v. *United States*, 195 F. 2d 441). The petitioner in this case did identically what Ward did. (1) Ward gave the address of his employer as well as his residence address. In this case Venus gave the address of his employer in Modesto as well as the address of his parents, at which the record and the undisputed testimony of the clerk of the local board show was his permanent address through which mail would always reach him within two days. (2) In the *Ward* case the board did not attempt to use the business address but used only the residence address from which Ward moved without notifying the board. In this case the board used the Modesto address of Venus' employer from which petitioner had moved months before the order was mailed without notifying the board. (3) In this case the board made no effort to reach petitioner through his parents' address, which was his permanent address, but attempted to reach him only through his employer's address in Modesto. The facts in the two cases are identical in effect. (4) In *Ward* v. *United States* (344 U. S. 924) Ward gave two address to the local board and the local board used

only one, from which Ward had moved, and made no attempt to use the other. In this case Venus gave the board two addresses, one of which he had moved from, and the board admittedly made no attempt to use the other address.

It is manifest, therefore, that the distinction that the court below has drawn between *Ward* v. *United States* (344 U. S. 924) and the facts in this case is groundless and wholly without justification. So how can the court below under any circumstances make a distinction between this case and *Ward* v. *United States* (344 U. S. 924)? Instead of Venus misplacing reliance upon *Ward* v. *United States* (344 U. S. 924) the court below has made a distinction without a difference.

The court below has also misinterpreted *Bartchy* v. *United States,* 319 U. S. 484 (1943). The court below made such distinction because the two majority judges of the court below believed that the jury could not reasonably expect mail to come into Venus' hands in time for compliance; so he was guilty. Hindsight is better than foresight!

The court below should not have looked at this case from that viewpoint. The case should be viewed from the standpoint of Venus in February, 1955. If he could reasonably have expected during the month of February, 1955, that mail would reach him in time for compliance at either one of the addresses given in the letter of June, 1954, then the petitioner is not guilty as a matter of law. It was error for the court below to conclude, in the face of the record in this case, that Venus could not reasonably expect mail to come into his hands at either one of the addresses given in the letter of June, 1954, during the month of February, 1955.

The month of February, 1955, is the crucial month. The trial court limited the indictment to that month. What happened before February is irrelevant and immaterial. What happened after February, 1955, is also irrelevant and immaterial under the ruling of the trial court, which

the court below approved. (See the opinion at pages 29 and 30, *infra.*)

In *Bartchy* v. *United States,* 319 U. S. 484 (1943), the Court said that a registrant had performed his duties under Section 1641.3 of the regulations when he had, in good faith, provided a chain of forwarding addresses by which mail "sent to the address which is furnished the Board, may be by the registrant reasonably expected to come into his hands in time for compliance." The court below fails to point out a single shred of evidence by which any reasoning person could come to the conclusion that Venus could not reasonably expect in February of 1955 that mail would reach him at either the Modesto address or at 650 11th Street, San Diego, California. This is admittedly so during the period of time from February 1 to February 21, 1955, the latter date being the day Venus helped his parents move. It should also be held so for the succeeding seven days.

One of the most striking pieces of evidence in the draft board file that points out that Venus could reasonably have expected to receive mail from the board at 650 11th Street, San Diego, California, is that on May 4, 1954, as shown in the registrant's file, an order to report for induction was mailed to the registrant at 650 11th Street, San Diego, California, and he received it through his parents. Since he had received this prior order to report when it was sent through his parents, it is stretching the imagination of man too far to come to the conclusion that he could not reasonably have expected in February, 1955, to receive mail at this address in time for compliance with any orders contained in such mail sent during February.

The court below (page 30, *infra*) states: "We might assume, although there is no proof of the fact, that mail directed to appellant by the local draft board during the early days of February to the Modesto address would have reached him. We cannot assume that mail directed by the local Board during the month of February, but after the

early date thereof, to the appellant at the Modesto address would have reached him."

During the first three weeks of February—up to February 21—Venus' parents were still living at the 650 11th Street address in San Diego. This was also the home of Venus and his permanent address. Thus the undisputed evidence leads the minds of reasonable men to only one conclusion, which is that had any correspondence been directed to the petitioner at either the Modesto address or his parents' address in San Diego, such correspondence could reasonably have been expected by Venus during this time to have come into his hands in time for compliance. Any conclusion other than this is based on mere speculation, as is so forthrightly pointed out in the dissenting opinion (page 35, *infra*) to which this Court is referred.

In the face of the undisputed evidence in this case showing that Venus could reasonably expect that mail would reach him during the first three weeks of February at either one of the two addresses given the board in the letter of June, 1954,—February 1 and February 21, 1955—then the sole basis for the conclusion of the court below that the petitioner is guilty is that there is no official notice of a change of address in the draft board file covering the last seven days of February. It is unjust and unreasonable in these circumstances to affirm the conviction of Venus for a violation of the Act and regulation solely because he did not act immediately after February 21, 1955, and before February 28, 1955, by writing another letter.

It has therefore been shown that *Bartchy* v. *United States*, 319 U. S. 484 (1943), and *Ward* v. *United States*, 344 U. S. 924 (1953), are applicable and the decision of the court below is in conflict with both. The court below has defied the holding in *Ward* v. *United States*, 344 U. S. 924 (1953), and departed from the ruling in *Bartchy* v. *United States*, 319 U. S. 484 (1943).

This question is manifestly important. There are millions upon millions of registrants involved. They daily

use the mails. They are not educated and trained in the law. They are not to be dealt with as though they were litigants represented by counsel.—*United States ex rel. Berman* v. *Craig*, 207 F. 2d 888, 891 (3rd Cir. 1953); *United States* v. *Greene*, 220 F. 2d 792, 794 (7th Cir. 1955).

The unfortunate set of circumstances in this case, to say nothing of the miscarriage in the mails that does happen from time to time and not to mention the possible error of the clerks of the local board in misfiling papers in files either in or out of the board at the time mail is received, show that what happened in this case could happen to any registrant regardless of whether he is a conscientious objector. This case lays down such a drastic and severe penalty for registrants using the mails in dealing with draft boards that this Court ought to take prompt action to correct the miscarriage that has occurred, else thousands if not hundreds of thousands of other registrants may find themselves unexpectedly snared and trapped by the sophisticated rule of law laid down by the court below.

Exception is taken to the statement appearing in the last full paragraph of the majority opinion: "• • • no good faith existed on the part of Venus with respect to his continuing duty between June 7, 1954, and early 1956 to inform the board." This is a false conclusion by the Court of Appeals. There was no allegation of continuing duty in the indictment. It was, moreover, impossible for the petitioner to have "no good faith" from June 7, 1954, to February 21, 1955, the time alleged in the indictment, because there was on file with the local board the letter informing the board of Venus' Modesto address and his San Diego address where he could always be reached. The Court of Appeals even goes beyond the limitation of February 21, 1955, placed upon the indictment by the trial court in its charge (see footnote 4 of the opinion, *infra*, page 29) and includes, as the basis for the conviction "early 1956." On what theory in law, in fact or in the stratosphere could there be basis

for the court's statement that Venus did not have good faith from June 7, 1954, to "early 1956"?

It is respectfully submitted that this is a substantial question of law that is of great public importance and that ought to be resolved by this Court even though the Court does not conclude that it has jurisdiction because the holding of the court below is out of harmony with two former decisions of this Court.[3]

II.

The district court committed reversible error in overruling the motion to dismiss the indictment. The motion to dismiss and the record in this case show an extraordinary and deliberately long delay by the Government in bringing the last count of the second indictment.

In the motion to dismiss petitioner stated, among other things, as follows:

> "The offense charged in the indictment is not brought in good faith, but was deliberately delayed by the United States Attorney to within six weeks of the expiration of the five year statute of limitations so as to prejudice the defendant and deny him of his rights to a speedy trial guaranteed by the Sixth Amendment to the United States Constitution, and the reasons therefor shall now be stated."

The motion to dismiss contained other extensive allegations that appear in the typewritten transcript of the record that show that petitioner was prejudiced by the

[3] In the event that this Court grants the writ of certiorari in this case on this ground, then it is respectfully submitted that the case be decided upon the papers and the record and the case be not docketed for oral argument, because it is manifest that the judgment of the court below is erroneous and in direct conflict with *Bartchy* v. *United States*, 319 U. S. 484 (1943), and *Ward* v. *United States*, 344 U. S. 924 (1953). In the last-cited case this Court took the action suggested here in this footnote. See also *United States* v. *Balogh*, 329 U. S. 692 (1947), and *Mathews* v. *West Virginia*, 320 U. S. 707 (1943).

long delay in bringing the prosecution. This is an important question that has not heretofore been determined by this Court but which ought to be decided by it in this case.

The holding of the court below is out of harmony with the dictum of this Court in *Smith* v. *United States*, 360 U. S. 1, 10 (1959), where the Court said: "* * * It is further suggested that it might be in the interests of the defendant to have the benefit of the speed that can be mustered by the filing of an information instead of an indictment. While justice should be administered with dispatch, the essential ingredient is orderly expedition and not mere speed. * * * Moreover, if contrary to sound judicial administration in our federal system, arrest and incarceration are followed by inordinate delay prior to indictment, a defendant may, under appropriate circumstances, invoke the protection of the Sixth Amendment." Compare Rule 48(b) of the Federal Rules of Criminal Procedure.

It is submitted also that the holding of the court below is in conflict with *Pollard* v. *United States*, 352 U. S. 354, 360-362 (1957); *Taylor* v. *United States*, 238 F. 2d 259, 260-261 (D. C. Cir. 1956); *United States* v. *Provoo*, 17 F. R. D. 183, 194-203 (D. Md. 1955), 350 U. S. 857 (1955).

The question involved under this point is of great public importance because of the many thousands of cases that are annually prosecuted under the criminal code of the United States, some of which are inordinately delayed by the Government by waiting until the statute of limitations has almost run out before indictment as in this case.

The action of the court below in approving the deliberate delay of a prosecution by indictment in a case that had been pending several years (and the record showed that the prosecution knew of the violation during the pendency of the first indictment for several years) is a dangerous precedent. The United States Attorney had been notified by the Selective Service System of the violation several years before the indictment was brought. The

United States Attorney concluded that there was no merit to the charge that petitioner failed to keep his local board advised and notified the board that there was reasonable doubt as to the guilt of petitioner on the count. See the letter from the United States Attorney to the draft board dated June 12, 1957, which, although a part of the draft board file, was excluded but which appears as one of the exhibits for identification. See also the entire motion to dismiss the indictment.

The question is therefore of great national importance, and in view of the dictum of the Court in *Smith* v. *United States,* 360 U. S. 1, 10 (1959), and the conflict between the holding of the court below and that of the United States Court of Appeals for the District of Columbia in *Taylor* v. *United States* 238 F. 2d 259, 260-261 (1956), the petition for writ of certiorari should be granted in this case so that the law can be clarified and this important question not be left dangling in the air like a Damocles' sword over the heads of a multitude of persons charged with crime in the federal courts.

It is respectfully submitted that in the event the Court does not decide that there is a conflict between *Taylor* v. *United States,* 238 F. 2d 259, 260-261 (D. C. Cir. 1956), and the decision of the court below, then this Court ought to grant the writ because of the great public importance of the question.

CONCLUSION

WHEREFORE, for the reasons above stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

HAYDEN C. COVINGTON
KENNETH A. BARWICK
Counsel for Petitioner

March, 1961.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CARLIN CONSTANTINE VENUS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 16,961
Dec. 24, 1960

On Appeal from the United States District Court for the Southern District of California, Southern Division.

Before: BARNES and JERTBERG, Circuit Judges; and BOLDT, District Judge.

BARNES, Circuit Judge:

Appellant appeals from a judgment of conviction for knowingly failing and neglecting to keep the local draft board advised of the address where mail would reach him at all times. The indictment charged an offense in violation of Title 50 Appendix U.S.C.A. § 462[1]

[1] Title 50 Appendix, U.S.C.A. § 462 provides in relevant part as follows:
"(a) Any * * * person charged as herein provided with the duty of carrying out the provisions of this Title [Sections 451-470 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty * * * shall upon conviction in any District Court of the United States of competent jurisdiction be punished by imprisonment of not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. * * *"

Jurisdiction of the district court was invoked under the provisions of Title 18 U.S.C.A. § 3231 and Title 50 Appendix U.S.C.A. § 462. Jurisdiction of this court to review the appeal from the judgment rests on the provisions of Title 28 U.S.C. §§ 1291 and 1294.

In order to review at least one of the questions presented on this appeal it is necessary to briefly summarize some of the past history of appellant's entanglement with the provisions of the Universal Military Training and Service Act. Appellant registered with the Local Board No. 140 in San Diego County, California, on September 15, 1948. During the years 1950 and 1951 appellant was classified at various times in classifications I-A and III-A. On November 19, 1951, appellant returned to the local board a completed conscientious objector form, in which he claimed that he was, by reason of his religious training and belief, conscientiously opposed to participation in war in any form and claimed exemption from both combatant and noncombatant service. During the years 1952 and 1953 appellant was at various times classified in classifications I-A-O, II-A and I-A. Thereafter appellant remained classified or reclassified I-A, this last classification being on September 1, 1955, following an unsuccessful appeal by the appellant to the appeal board. On September 2, 1955, notice of classification was sent to the appellant at Modesto, California, which appellant claimed he never received. Such claim was advanced by appellant in the prosecution of the first indictment returned against the appellant. On October 28, 1955, the local board ordered appellant to report for induction on November 8, 1955, which order to report was likewise sent to Modesto, California, which was likewise claimed by appellant to have never been received.

Appellant failed to report for induction on November 8, 1955, and on August 8, 1957, appellant was charged by indictment with the offense of failing to report for induction on November 8, 1955, at San Diego, California. Following trial of that offense to a jury, appellant was convicted, and

appealed from the judgment of conviction to this court. The judgment of conviction was reversed by this court in *Venus v. United States*, 9 Cir., 1959, 266 F.2d 386. Following such reversal the offense in the indictment was tried twice to a jury, resulting in each case in a mistrial because of failure to reach a verdict in each case on the part of each jury.

On December 23, 1959, a two-count indictment was returned against the appellant. The first count of this new indictment charged appellant with the offense of failing to perform a continuing duty to report for induction in April 1956. The second count of the new indictment charged that appellant was a person within the class made subject to Selective Service under the Universal Military Training and Service Act; that he registered as required by said Act and the regulations thereunder, and became a registrant of local board No. 140; and that he "thereafter had a duty to keep said board advised at all times of the address where mail would reach him; that on or about February 1, 1955 . . . the defendant, Carlin Constantine Venus, knowingly failed and neglected to perform said duty required of him under said Act and the regulations promulgated thereunder, in that he knowingly failed and neglected to keep said board advised of the address where mail would reach defendant."

The offenses charged in the two indictments—the failure to report for induction on November 8, 1955, alleged in the first indictment returned on August 8, 1957, and the two offenses—the failure to perform a continuing duty to report for induction in April 1956, and the failure to keep the local draft board notified where mail would reach appellant at all times—set forth in the indictment returned on December 23, 1959, were consolidated for trial. The case was tried to a jury in May of 1960. Following deliberations of three days, the jury returned a verdict finding appellant guilty on the second count contained in the second indictment. The jury reported that it was unable to agree on the offense set forth in the first indictment, and on count one of the second indictment. Thereafter the trial court dis-

missed the first indictment and the first count of the second indictment sua sponte "in the interests of justice, on the ground that there had been now four trials." Appellant was committed to custody for three years, and ordered to pay a fine of $500.00.

On December 29, 1959, the appellant moved the district court to dismiss the indictment returned on December 23, 1959, against appellant, on the ground that the delay of appellee in returning the indictment charging appellant with failure to keep the local draft board advised at all times of an address where mail would reach him deprived appellant of his right to a speedy trial, as guaranteed by the Sixth Amendment to the Constitution of the United States. This motion was denied by the district court.

One of appellant's specifications of error on this appeal is that the district court committed reversible error in so doing. We will consider this assignment of error before proceeding to the other points involved in the review of this appeal.

The indictment returned against appellant on December 23, 1959, alleged that the offense set forth in the second count was committed on or about February 1, 1955. Hence the indictment was returned within the five-year period of limitations specified by Title 18 U.S.C.A. § 3282.[2] Trial on this offense commenced on May 5, 1960, and was concluded May 14, 1960, which was less than five months from the date of the return of the indictment.

Appellant concedes "there are a large number of cases that hold that a prosecution is not barred by the statute of limitations so long as it is brought within the five-year statutory period. The courts have held that limitation does not apply even if the indictment is delayed to near the end of the five-year period." (Appellant's Opening Brief, p. 54.)

[2] "§3282. Offenses not capital. Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed. As amended Sept. 1, 1954, c. 1214, § 10(a), 68 Stat. 1145."

Mindful of the above stated concession, appellant contends that the delay of appellee in causing appellant to be indicted was violative of the speedy trial provisions of the United States Constitution. No claim is advanced by appellant that he was arrested, detained or held in custody on the offense charged in count two of the indictment prior to the return of the indictment. In short, appellant's argument is that he should have been sooner indicted. We find no merit in this contention. As stated in *Parker v. United States*, 6 Cir., 1958, 252 F.2d 681, *cert. denied* 356 U.S. 963:

> "The provisions of the Sixth Amendment guaranteeing a speedy trial to anyone charged with an offense, contemplate a pending charge and not the mere possibility of a criminal charge."

See also *D'Aquino v. United States*, 9 Cir., 1951, 192 F.2d 338, *rehearing denied* 203 F.2d 390, *cert. denied* 345 U.S. 935 (1952), in which this court stated, at page 350:

> "Appellant, however, says that her military detention in Japan in the year following October 1945, demonstrates that she was denied a speedy trial. We shall have occasion to refer to the character of the detention later in this opinion, but wholly apart from whether that detention was or was not in accordance with law, it has no bearing whatever upon the question of her right to a speedy trial, which is one that arises after a formal complaint is lodged against the defendant in a criminal case."

Appellant's reliance on *United States v. Provoo*, D.Md. 1955, 17 F.R.D. 183, *affirmed* 350 U.S. 857 (1955), and *Taylor v. United States*, D.C.Cir., 1956, 238 F.2d 259, is completely misplaced. In the *Provoo* case the defendant was arrested on a formal charge in September 1949, but was not indicted in the proper district until October of 1954. In the *Taylor* case the indictment was returned on February 23, 1954, and trial did not commence until March 28, 1956.

It clearly appears in the *Taylor* case that the defendant in no manner waived his right to a speedy trial.

Before proceeding further we will briefly summarize the evidence which was before the jury relevant to the offense for which appellant was convicted.

When appellant registered with his local draft board in San Diego County, he gave as his mailing address 184 National Avenue, Chula Vista, California. The clerk of the local board testified that at some time prior to June 7, 1954, appellant gave as an address where he could always be reached the address of his parents, which was 650 Eleventh Street, San Diego, California. On July 14, 1950, notice of classification was mailed to appellant at the address at 184 National Avenue, Chula Vista, California, but was returned to the local board marked "Moved, left no address." Between that date and June 7, 1954, appellant notified the local board of change of address on five separate occasions, the last change of address prior to June 1954 being 650 Eleventh Street, San Diego, California. On June 7, 1954, appellant filed with the local draft board a letter in which he stated: "At this time I wish to inform you of my departure from San Diego to Modesto, Calif. because of secular employment. The Federal Bureau of Investigation I have notified, when in Los Angeles after induction procedures. My new address is (Same employer) 1431 10th St. Modesto, California, but can be reached within one or two days, at my San Diego address." The return address given on the envelope enclosing the letter was 650 Eleventh Street, San Diego. The letter with envelope attached is in the draft board files. The draft board file of appellant is contained within three cover sheets which on the outside show the many notifications of changes of address by appellant. One of these cover sheets, following the listing of the Modesto address, contains the notation in red pencil "(see letter attached)". The other two cover sheets contain no such notation. The explanation given by the clerk of the board for the presence of three cover sheets was that new cover sheets are used when the old cov-

er sheets become "dog-eared." Appellant lived at Modesto, California, from June 7, 1954, to February 7, 1955, on which date he moved to Los Angeles County. No changes of addresses were received by the local board from the appellant for the period from June 7, 1954, to the end of 1955. Following appellant's return to Los Angeles County from Modesto, he moved from one address to another on five or six occasions but did not notify the local draft board of any of said addresses because said addresses were temporary. Appellant testified that in the middle of February 1955, his parents moved from 650 Eleventh Street to 1120 Thirtieth Street, San Diego. Appellant's father testified that he left a forwarding address with the San Diego Post Office, but appellant did not file any forwarding address with the Post Office in this instance. Appellant testified that on or about February 19, 1955, he deposited a government post card in the United States Post Office at Los Angeles, addressed to his local board, notifying the board that his address had been changed to 1120 Thirtieth Street, San Diego, California. Appellant's draft board file does not reveal the receipt of this card by the draft board. It appears from the record that in February 1955, and for some months prior thereto, the Selective Service file of appellant was out of the possession of the local board and in the hands of the Selective Service officials in Los Angeles. A dummy file was used by the clerk of the local board during this period. The clerk of the local board testified that if the card had been received it would have been placed in appellant's file. On September 2, 1955, there was mailed to the appellant by the local board notification of his I-A classification, addressed to 1431 Tenth Street, Modesto, California. On October 28, 1955, the local draft board mailed to appellant at the Modesto address an order dated October 28, 1955, to report for induction at San Diego on November 8, 1955. The envelopes containing the notice of classification and the order to report for induction contained the return address of the local board, but neither letter was ever returned to the local board. The appellant testified that he

never received either the notice of classification or the order for induction. No notices were sent by the draft board to appellant at any other address.

It should be borne in mind that we are not considering any offense charged against the appellant except that on which appellant was convicted, to-wit, that appellant knowingly failed and neglected to keep the local board advised of the address where mail would reach him. Section 1641.3 of the Selective Service Regulations[3] places the duty on each registrant to keep the local board advised at all times of the address where mail will reach him.

The validity of Section 1641.3 of the Regulations was upheld by the Supreme Court of the United States in *Bartchy v. United States,* 319 U.S. 484, in which opinion the following interpretative language appears (at 488):

> "We think the Government correctly interprets the Act, § 11, and the regulation, § 641.3 not to require a registrant who is expecting a notice of induction to remain at one place or to notify the local board of every move or every address, even if the address is temporary. • • • The regulation, it seems to us, is satisfied when the registrant, in good faith, provides a chain of forwarding addresses by which mail, sent to the address which is furnished the board, may be by the registrant reasonably expected to come into his hands in time for compliance."

We will now consider appellant's assigned error "that the district court erred in failing to grant appellant's motion for judgment of acquittal made at the close of all the evidence, and renewed after the verdict of the jury."

[3] Section 1641.3 of the Selective Service Regulations (32 C.F.R. § 1641.3) reads as follows:

"Communication by Mail.—It shall be the duty of each registrant to keep his local board advised at all times of the address where mail will reach him. The mailing of any order, notice, or blank form by the local board to a registrant at the address last reported by him to the local board shall constitute notice to him of the contents of the communication, whether he actually receives it or not."

Under this point, the appellant states:

> "The gist of the argument under this point is—
>
> "(1) The indictment charged appellant with the offense of failing to keep his local board informed as to where mail would reach him on February 1, 1955, and as a matter of fact on such date mail would have reached him at Modesto, California;
>
> "(2) Appellant at all times had in his draft board file a letter written in June of 1954 that informed the local board of an address in San Diego where he could always be reached by mail."

In light of our review of the evidence in this case and the interpretative language in *Bartchy*, we are convinced that the trial court was correct in the denial of the appellant's motion. Section 1641.3 of the Regulations requires a registrant to keep his local board *advised at all times* of the address where mail will reach him. Count two of the second indictment returned against the appellant limited the appellant's duty to "on or about February 1, 1955." During the course of the trial, the district court, in its rulings on the admission of evidence and in its instructions to the jury, held that proof of the offense *at any time during the month of February 1955 would support the charge in the indictment.*[4] It is necessary for us to pass upon the correct-

[4] "Now this indictment alleges that this occurred on or about February 1, 1955. The proof that you heard on that encompasses a period not earlier than February 1, 1955 and running up to February 20th or 21st, 1955, and the Government is making no contention that if Mr. Venus mailed the change of address on February 20th or 21st, whatever the date was he claimed he mailed it, that that was too late. The Government's contention is that he didn't mail it.

"So therefore this count is going to concern solely that simple issue, was that notice mailed sometime in February? It doesn't make any difference when it was mailed in February, if it was mailed. It is just about that simple. The Government doesn't have to prove the exact date. The Government alleges that the defendant did not do this act on or about the 1st of February. But the proof, as I say, encompasses a period that runs on up to the 20th. . . ." (Tr. p. 508.)

* * *

"But you are not concerned with what particular date that card was

ness of such rulings and instructions. We find no error in them.[5]

It is undisputed that appellant remained in Modesto until February 8, 1955. We might assume, although there is no proof of the fact, that mail directed to appellant by the local draft board during *the early days* of February to the Modesto address would have reached him. We cannot assume that mail directed by the local draft board during the month of February, but after the early days thereof, to the appellant at the Modesto address would have reached him. No mail was directed to him by the local draft board at the Modesto address at any time during the month of February 1955. In fact, no mail was directed to him at the Modesto address by the local board until September 1955, some six months later. In the letter of June 7, 1954, in which appellant advised the local draft board of the new Modesto address, he stated that his employer was the same as one previously reported to the draft board, "but [I] can be reached within one or two days at my San Diego address." The cover sheet of appellant's draft board file shows that appellant's address at the time that appellant furnished to the draft board the Modesto address was 650 Eleventh Street, San Diego, California. Therefore, when

mailed in February, because the Court has already instructed you that the area covered in the evidence, sometime between the first and the 21st, is close enough to the charge in the indictment and is a close enough time for the defendant's mailing the change of address card." (Tr. p. 518.)

[5] See United States v. Tramaglino, 197 F.2d 928, 932, cert. denied 344 U.S. 864. There the Court said: "Our decision in United States v. Wilson, 2 Cir., 154 F.2d 802, 805, requires only 'substantial similarity' between the indictment dates and those brought out in trial; all the versions here were within a few weeks of one another and of the indictment dates." In the Wilson case cited in Tramaglino, the indictment charged that a conversation material to the offense occured on or about July 20. The Court held that even if the conversation actually occurred on or around September 1, as defendant's analysis of the evidence indicated, the act proved was not too remote to support the indictment.

A variance between what is charged in the indictment and what is proved is not material or prejudicial unless it involves elements of surprise that would hamper defendant's efforts to prepare their defense. United States v. Ragen, 314 U.S. 513, 526.

the draft board received the letter, it had knowledge of that San Diego address. But that address was not *then* the address of the parents. No change in the parents' address had been given the board.

The record shows that the Modesto address was the sixth change of address which appellant furnished to his local draft board. The record further discloses many other communications from appellant to the draft board from the date of his registration to his last change of address, and several personal appearances before the board, all of which disclose his understanding of the duty placed upon him by law. The voluminous record before the draft board discloses that appellant was persistent and determined in his efforts to resist the I-A classification and to keep alive and exhaust his administrative remedies, up until February 1955. After that time he no longer complied with the law with which he was so familiar.

Appellant had a simple duty to perform--to keep his local draft board advised at all times where mail would reach him. This he failed to do. Two letters addressed to appellant at the last address he had given the board were never returned to the board, yet appellant claimed he had not received them. The postcard appellant says he mailed to the board was never delivered to it. While there is a conflict in the testimony, the jury had the right and did choose to believe appellant's failure to advise the draft board of his change of address was knowingly and wilfully done. The question of appellant's truthfulness and good faith was a question of fact for the jury's determination. The address given as that of appellant's parents, "where he could always be reached," was not accurate; no new address was given to the board, either by appellant or his parents, when the latter moved. That appellant had, on six previous occasions, advised the board of a change of address proves nothing that is of aid to appellant—it merely proves that he, with complete knowledge and understanding of his obligation and duty under a law (the provisions of

which were thoroughly familiar to him), knowingly violated that law for a period of eighteen months, from early June 1954 to the end of 1955. (Section 1641.3 of the Selective Service Regulations (32 C.F.R. § 1641.3).) Appellant had a continuing duty during that eighteen month period to give the board accurate information as to where he could be reached.

To shift the blame for appellant's failure to follow the law to the board by claiming that but one of the three cover-sheets had the notation "(see letter attached)", and that therefore there was no proof appellant could not have been reached at such address because no letters were sent to the parents' address, is beside the point. The address so given was *not* the parents' address "at all times" during the eighteen months' failure by appellant to furnish his own address, nor "on or about February 1st, 1955." Appellant was not required by law to furnish his address to the local board only if that board might have letters it wanted to mail him —but *at all times.*

In the opinion of the jury, in which we join, this appellant had not met the test laid down in *Bartchy v. United States, supra,* that a registrant must "in good faith provide a chain of forwarding addresses by which mail, sent to the address which is furnished the board, may be by the registrant reasonably expected to come into his hands in time for compliance." In *Bartchy,* the registrant, a seaman, had relied on the regular procedure of his Maritime Union (procedures which had been effective in the cases of other registrants), but which there failed because of "a mistake of the official of the Union."

In *Ward v. United States,* 5 Cir., 1952, 195 F.2d 441, the appellate court refused to disturb the verdict of the jury convicting defendant. But there Ward had given to the local board, on its questionnaire, the address of his employer as well as his residence address. Ward moved from his residence address without notifying the board, relying on the business address which remained "good" and at which

Ward had proved he did receive mail. This business address the board did not attempt to use, despite Selective Service Regulations requiring them to do so. Section 1642.41.(b) of Selective Service Regulations. See note I of *Ward v. United States, supra.* The Supreme Court in a *per curiam* opinion without discussing the facts held the record did not support the charge "of a deliberate purpose to violate the law." Thus, the facts differ. (344 U.S. 924 (1935).)

Here the evidence is such that a trier of fact could well believe that no good faith existed on the part of Venus with respect to his continuing duty between June 7, 1954, and early 1956 to inform the board; and that he had knowingly and with deliberate purpose violated the law. That factual finding implicit in the jury's verdict is binding on this court, in the absence of error. We cannot hold the jury's verdict erroneous as a matter of law.

The judgment is *affirmed.*

JERTBERG, Circuit Judge (dissenting):

I am unable to agree with the conclusion reached in the majority opinion that the trial court did not err in failing to grant appellant's motion for judgment of acquittal made at the close of all of the evidence and renewed after the verdict of the jury. In *Bartchy v. United States,* 319 U.S. 484, the Supreme Court stated that the regulation which placed upon appellant the duty to keep his local draft board advised at all times of the address where mail would reach him "is satisfied when the registrant, in good faith, provides a chain of forwarding addresses by which mail, sent to the address which is furnished the board, may be by the registrant reasonably expected to come into his hands in time for compliance." The crucial period in this prosecution, as stated in the trial court's instructions to the jury, is the

month of February 1955. The letter of June 7, 1954, directed by the appellant to the draft board, and quoted in the majority opinion, stated that appellant's employer was the same one as the one previously reported to the draft board, and that appellant could be reached "within one or two days" at his San Diego address. The letter was enclosed in an envelope which bore the return address of 650 - 11th Street, San Diego, California, which appellant had previously furnished to the draft board. This address was also the address of appellant's parents, which had been furnished to the draft board long prior to June 7, 1954 as an address where appellant could always be reached. The clerk of the local draft board testified that the appellant had given his parents' address as the place where he could always be reached. The clerk further testified that the appellant was specifically requested not only to give the address where he lived or resided but also to give a reference of someone—his parents in this case—who would know his address or through whom mail would reach him. The clerk further testified that the return address on the outside of the envelope referred to the address of appellant's parents. In explaining why the notation "see letter attached" was made on the cover sheet of appellant's draft board file opposite appellant's Modesto address, the clerk stated "I made that entry for the simple reason that if any mail were returned to us from the Modesto address that I would look for and try and contact him through his San Diego address." No notices were sent by the local draft board to the appellant at either the Modesto or the San Diego address during the month of February 1955. The record is likewise clear that no effort was made by the draft board at any time to contact appellant's parents or his employer. In fact, no mail was directed by the local draft board to the appellant until September 1955. It is undisputed that appellant's parents remained at 650 - 11th Street, San Diego, California, until the middle of February 1955, at which time they moved to 1120 - 30th Street, San Diego, at

which time they furnished to the San Diego Post Office the latter address as the place where mail should be forwarded. It appears clear to me that notice directed to the appellant at 650 - 11th Street, San Diego, California, during the month of February 1955 would have come into the hands of the appellant, notwithstanding the fact that appellant's parents moved to a new address about the middle of February. Also, in my view, it is pure speculation to assume that mail directed to the appellant at the Modesto address during the month of February 1955 would not have come into the hands of the appellant.

I am convinced that the evidence in this case meets the test laid down in *Bartchy*, and that appellant, in good faith, provided a chain of forwarding addresses by which mail sent to the address which appellant furnished the board could be by the appellant reasonably expected to come into his hands in time for compliance. I would reverse the judgment of conviction.

APPENDIX B

Judgment of Court of Appeals

Appeal from the United States District Court for the Southern District of California, Southern Division.

This cause came on the be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this case be, and hereby is affirmed.

(ENDORSED) Judgment
Filed and entered: December 24, 1960
FRANK H. SCHMID, Clerk

APPENDIX C

Order of Court of Appeals on Petition for Rehearing

Before: BARNES and JERTBERG, Circuit Judges, and BOLDT, District Judge

For the reasons set forth in the majority opinion, the petition for rehearing is denied. The suggestion for a rehearing en banc is rejected.

STANLEY N. BARNES
Circuit Judge

I concur:

GEORGE H. BOLDT
District Judge

I dissent, and vote to grant the petition for rehearing for the reasons set forth in my dissenting opinion. I reject the suggestion that a rehearing en banc be had.

GILBERT H. JERTBERG
Circuit Judge

[February 2, 1961]

APPENDIX D

Order Extending Time To File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 3, 1961.

(S) W. O. DOUGLAS
Associate Justice of the
Supreme Court of the United States

Dated this 23rd
day of February, 1961.

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FILED
MAY 3 1961
JAMES R. BROWNING, Clerk

No. 75

In the Supreme Court of the United States

OCTOBER TERM, 1960

CARLIN CONSTANTINE VENUS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
HERBERT J. MILLER, JR.,
Assistant Attorney General,
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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 865

CARLIN CONSTANTINE VENUS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Vol. V, 3–16;[1] Pet. App. 21–35) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 24, 1960, and a petition for rehearing was denied on February 2, 1961 (Vol. V, 17, 18; Pet. App. 36, 37). On February 23, 1961, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to April 3, 1961, and the petition

[1] The record consists of five volumes. Volumes two through four, which are consecutively paginated, constitute the transcript in the district court and will be referred to as "Tr."

was filed on April 1, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to support petitioner's conviction for having willfully failed to keep his local draft board advised of an address where mail could reach him.

2. Whether petitioner was denied the right to a speedy trial.

STATUTE AND REGULATION INVOLVED

Section 12(a) of the Universal Military Training and Service Act, 50 U.S.C. App. 462(a), provides in pertinent part:

> Any * * * person charged as herein provided with the duty of carrying out any of the provisions of this title * * * or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *. * * *

Selective Service Regulation 1641.3, 32 C.F.R. 1641.3, provides:

> It shall be the duty of each registrant to keep his local board advised at all times of the address where mail will reach him. The mailing of any order, notice, or blank form by the local board to a registrant at the address last

reported by him to the local board shall constitute notice to him of the contents of the communication, whether he actually receives it or not.

STATEMENT

An indictment, returned on August 8, 1957, in the District Court for the Southern District of California, charged petitioner with having knowingly failed to report for induction into the armed forces on November 8, 1955 (Vol. I, 2–3). His conviction was reversed on appeal because of improper instructions to the jury. *Venus* v. *United States*, 266 F. 2d 386 (C.A. 9). Thereafter, petitioner was retried on two other occasions, but mistrials were entered because the jury, in each case, was unable to agree upon a verdict.

On December 23, 1959, a two-count indictment was returned in the district court which charged petitioner with having willfully failed to perform a continuing duty of reporting for induction in April 1956 (count one), and with having willfully failed on or about February 1, 1955, to keep his local Selective Service board notified of his address where mail would reach him (count two) (Vol. I, 4–6). Following a jury trial in May 1960, petitioner was convicted on count two of the second indictment (Tr. 572).* He was sentenced to three years' imprisonment and to pay a $500 fine (Tr. 592). On appeal, the conviction was affirmed, one judge dissenting (Vol. V, 3–16, 17; Pet. App. 21–35, 36).

*The first indictment and count one of the second indictment were dismissed by the court after the jury was unable to reach a verdict on these charges (Tr. 573).

The pertinent facts relating to the conviction on count two may be summarized as follows:

1. On May 16, 1949, petitioner filed a Selective Service Questionnaire with Local Board No. 140 of San Diego, California. He admitted that he knew from the time he registered that he was required to keep the board informed of his address where mail would reach him (Tr. 257). Prior to June 1954, petitioner notified the local board on five occasions of changes of addresses, three of which were San Diego addresses (Vol. I, 15). On June 7, 1954, petitioner wrote the following registered letter to the board (Vol. I, 13):

> At this time I wish to inform you of my departure from San Diego to Modesto, Calif. because of secular employment. The Federal Bureau of Investigation I have notified, when in Los Angeles after induction procedures. My new address is (Same employer) 1431 10th st. Modesto, Calif, but can be reached within one or two days, at my San Diego address.

The return address on the envelope was "650 Eleventh Street, San Diego," which was the address of petitioner's parents (Tr. 142–144) and was the address previously given by petitioner to the board.[3]

In early February 1955, petitioner moved from Modesto to Los Angeles where he engaged in the tree-cutting business with a friend (Tr. 210). He

[3] In August 1954, the local board reported to the United States Attorney that petitioner had failed to submit to induction in May 1954. An indictment for this offense was dismissed in July 1955 after this Court's decision in *Gonzales* v. *United States*, 348 U.S. 407.

left no forwarding address (Tr. 202–203). He testified that this was because when he left Modesto his parents, friends, and the Watch Tower Bible Tract Society knew his whereabouts (Tr. 219). On February 19, and 20, 1955, he helped his parents move from 11th Street to 30th Street in San Diego (Tr. 210, 213–215). He testified that, at about this time, he addressed and mailed from Los Angeles a post card to the local board giving notice that he was no longer living in Modesto and that mail could reach him at the 30th Street address of his parents (Tr. 213–216). He said that he put his parents' return address on the back of the post card (Tr. 215).[4] No such post card was received by the local board. Mrs. Haisch, a clerk of the local board, testified that, pursuant to direction from the United States Attorney's Office, she searched through about 3,000 out of 18,000 Selective Service files, and was unable to locate such a change of address card (Tr. 182–184, 188). She also searched through about 2,000 files in which the respective registrants were born in 1929 and 1930, and searched through about 1,000 files according to classifications (Tr. 183–184, 188). She said that petitioner's file was out of the office from November 1954 to July 1955, the file being at the California State Selective Service Headquarters at that time, but that a duplicate or "dummy" cover sheet was made

[4] A witness for petitioner testified that he was with petitioner when petitioner mailed the card. The witness did not see the writing but petitioner told him what it was for (Tr. 275–276).

for petitioner which would contain correspondence to or from petitioner while his regular file was out of the office (Tr. 166–167).

Petitioner testified that he lived at 2012 W. 6th Street in Los Angeles from February to about the middle of April 1955; that he then moved to Venice, California, where he lived for about a month; that he returned to Los Angeles and lived for about a week at the Del Mar Hotel, and for about a month at 513 Grand Street; and that he then moved to 2006 Strawns Drive where he lived from the summer to December 31, 1955 (Tr. 255–257).

Petitioner did not notify the board of any changes in address between June 7, 1954, and the end of 1955 (Tr. 122, 257).[5] The board sent a notice of classification as I–A to petitioner at the Modesto address in September 1955 and an induction notice was sent there in October 1955. Neither was returned to the board (Tr. 118–119, 128). Petitioner testified that he did not receive them (Tr. 216–217). The board made no attempt to reach petitioner through his parents or employer because the board assumed that petitioner had received the unreturned notices (Tr. 144–145, 151). Petitioner's first communication with the board after his letter of June 7, 1954, was an interview with an F.B.I. agent in April 1956 concerning petitioner's failure to report for induction in November 1955 (Tr. 191–192, 198–199).

[5] Petitioner also did not notify the board of his second marriage in December 1955, until April 9, 1956 (Tr. 192). In 1950 petitioner had notified the board of his first marriage, but he did not notify it of his subsequent divorce (Tr. 241–242).

2. The district court construed count two of the indictment as limited to the failure to give notice during the month of February 1955. The court charged the jury that if they found that petitioner had mailed a change-of-address notice to the local board in February 1955, "then whether or not the card was received by the Local Board, the defendant should be acquitted on count two in the second indictment" (Tr. 517). The court pointed out that petitioner had testified that he mailed the notice, and that it was within the province of the jury to believe or disbelieve him in its determination of the facts (Tr. 518). The court also charged (Tr. 540–541):

> Defense Counsel have called my attention to the fact that it is one of their contentions that there was a previous letter in the file in which the defendant had stated something about where mail might reach him [the letter of June 7, 1954]. It is, therefore, their contention that whether or not he mailed that letter of February 1, 1955, on their theory of the case, there was a place where mail would reach him and he therefore had complied. * * * If the Jury find that the defendant had at all times kept the Board advised where mail would reach him, then of course he is to be acquitted.

ARGUMENT

1. The sufficiency of the evidence to support the conviction depends, for the most part, on the resolution of issues of credibility, and therefore presents no issue for review by this Court. Petitioner had two defenses to the charge of failure to notify the board of his

change of address in February 1955: (a) that he did in fact send a notification at that time, and (b) that, in any event, his letter of June 7, 1954, stating that he could be reached at his parents' San Diego address within a day or two, was sufficient notification of an address where mail could reach him.

a. The first defense clearly depended on the jury's estimate of petitioner's veracity and is not seriously pressed in this Court. The jury could reasonably believe that no notification had been sent. The testimony of the clerk of the board showed that, even though the file was out of the office, the card would have been put in a dummy file if it had been received (Tr. 166–167). Moreover, her testimony showed that a thorough search had been made to make certain that the card had not been misfiled (Tr. 183–184, 188).* Although petitioner claimed that he had put a return address on the card, he did not assert

* Petitioner contends (Pet. 3) without argument that the trial court erred in failing to give his instructions number 45 and 46 to the jury regarding the presumption of receipt of mail matter duly addressed and mailed. But these instructions were covered in substance by the court when it charged the jury that a properly addressed and mailed letter or card is presumed to have been received by the addressee in the due course of the mails; that before such a presumption arises there must be "clear proof of the mailing" and proof that the communication was "properly addressed"; and that the presumption would not arise unless it were shown that the addressee "was at or in contact with" the address to which the communication was mailed (compare Vol. I, 95–96 with Tr. 502–503, 517, 540–541). See *Sugarman* v. *United States*, 249 U.S. 182, 185; *Shibley* v. *United States*, 237 F. 2d 327, 333 (C.A. 9), certiorari denied, 352 U.S. 873.

that it had been returned. Moreover, the jury, who saw and heard petitioner, could well have found that his credibility had been impeached.[7]

b. Petitioner stresses here (Pet. 13–18) the argument that his letter of June 7, 1954, constituted a sufficient notification of his parent's San Diego address where mail could reach him, and relies on (Pet. 13–16) *Bartchy* v. *United States,* 319 U.S. 484, 488–489, and *Ward* v. *United States,* 344 U.S. 924. In *Bartchy,* this Court held that the registrant's duty "is satisfied when [he], in good faith, provides a choice of forwarding addresses by which mail, sent to the address which is furnished the board, may be by the registrant reasonably expected to come into his hands in time for compliance." In *Ward,* the Court held that the evidence did not support the charge that the defendant had deliberately failed to comply with the Act where he had supplied the local board with the address of his employer, as well as his residence address, and the board did not attempt to reach him through the employer when it knew from the return of the notice that mail addressed to his residence had not reached him.

Here the Modesto address furnished the board in the June 7, 1954, letter was not the beginning of a chain of

[7] Petitioner had previously, in June 1950, failed to notify the board of a change of address; he had notified the board of his marriage in 1950, but not of his divorce; he had not properly informed the board of the address at which he lived for six months in Los Angeles in the latter part of 1955 or of his second marriage in December 1955.

forwarding addresses by which mail would ultimately reach petitioner. Petitioner left no forwarding address in Modesto after he moved to Los Angeles and the notices sent by the board to the Modesto address were neither forwarded nor returned to the board. As to the San Diego address of petitioner's parents, it was not the principal address which petitioner had given the board. The board had no reason to try the San Diego address because mail sent to the address which petitioner had represented was later than the San Diego address had not been returned. Petitioner himself did not regard the San Diego address as sufficient to fulfill his known duty to keep the board informed of his whereabouts, for that address was on file with the board before petitioner wrote the letter of June 7, 1954, notifying the board of a change of address. His claim that he did send a notification of change of address when he moved from Modesto—a claim which the jury must have disbelieved—again shows his awareness that the old address of his parents was not a sufficient compliance with his duty to keep the board informed. And, in any event, petitioner's parents moved in February 1955, and petitioner failed to notify the board of that fact, although he had helped his parents move. This in itself is sufficient to sustain petitioner's conviction for failure to notify the board of his change of address in February 1955.

Petitioner's argument amounts to this—that even though he moved from the address which he had given without notifying the board of that fact, and even though his parents moved from the other address which petitioner had given, without petitioner giving

notice of that fact—the board, in February 1955, might have found the new address of his parents and through them the new location of petitioner. On this theory a fugitive from justice would be excused if he could show that diligent police work could have uncovered his whereabouts. Petitioner cannot thrust this obligation on the board to escape his own delinquency. The jury reasonably found that petitioner knew that he was under a duty to inform the board of his new address, or at least of his parents new address, and that he deliberately failed to do so.

2. Petitioner argues (Pet. 18–20) that since the indictment for failure to notify the board of the address in February 1955 was not returned until 1959, he was denied a speedy trial, even though the indictment was returned within the five-year period of limitations fixed by Congress (18 U.S.C. 3282). Petitioner does not claim that he was denied a speedy trial between the time the indictment was returned, December 23, 1959, and the date of trial, May 1960. Petitioner's contention is therefore clearly without merit, for the right to a speedy trial under the Sixth Amendment "is one that arises *after* a formal complaint is lodged against the defendant in a criminal case" (emphasis added). *D'Aquino* v. *United States,* 192 F. 2d 338, 350 (C.A. 9), certiorari denied, 343 U.S. 935; see *Parker* v. *United States,* 252 F. 2d 680 (C.A. 6), certiorari denied, 356 U.S. 964; *Taylor* v. *United States,* 238 F. 2d 259, 262 (C.A. D.C.). Since petitioner makes no attempt to show prejudice to his defense by the delay, his argument in essence is merely that the

period of limitation is too long; that, however, is a matter for Congress to decide.

Contrary to petitioner's contention (Pet. 19–20), there is no conflict of authority between the decision below and *Pollard* v. *United States*, 352 U.S. 354, *Smith* v. *United States*, 360 U.S. 1, *Taylor* v. *United States*, 238 F. 2d 259 (C.A. D.C.), or *Petition of Provoo*, 17 F.R.D. 183 (D. Md.), affirmed *sub nom. United States* v. *Provoo*, 350 U.S. 857. In *Pollard*, the court merely assumed *arguendo* that the Sixth Amendment requires prompt sentencing (352 U.S. at 361)—an issue which is not involved here. In *Smith*, this Court, in reversing the defendant's conviction for kidnapping on the ground that a capital charge must be tried by indictment as provided for under Rule 7(a), F.R. Crim. P., and not by information as was done in that case, pointed out, in dictum, that if "arrest and incarceration are followed by inordinate delay prior to indictment, a defendant may, under appropriate circumstances, invoke the protection of the Sixth Amendment." 360 U.S. at 10. But that statement has no application to the instant case, for there was not only no "inordinate delay" after arrest and prior to indictment, but petitioner was at large on bail prior to and during the trial.

In *Taylor*, the offenses were committed in 1950, indictment was returned in 1954, and it was not until 1956 that the government attempted to notify the defendant of the charges or seek to obtain custody over him for purposes of trial (during this period, the defendant was incarcerated in a New York

penitentiary following conviction of state charges). In holding that the defendant was denied a speedy trial, the court said (238 F. 2d at 262): "We do not rely on the mere lapse of time between the commission of the offenses and the date of indictment, considered by itself, for that is governed by the statute of limitations. It is the combination of the factors set forth above which motivates our decision." And in *Provoo,* unlike the situation at bar, the defendant had been "imprisoned more than five years awaiting trial and pending appeal on a capital charge," and the court found that he was denied a speedy trial after the formal charges were levied against him. 17 F.R. D. at 203.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

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RICHARD W. SCHMUDE,
Attorneys.

MAY 1961.

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BRIEF FOR PETITIONER

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ONE

This Court should hold that the motion for judgment of acquittal was erroneously overruled by the District Court because (1) the undisputed evidence shows that the petitioner was not guilty of unlawfully failing to keep his local board advised of an address where mail would reach him at all times, (2) the evidence wholly fails to show any willful and knowing violation of the law, (3) the evidence is as consistent with innocence as with guilt and (4) the draft board file showed two addresses at which mail could reasonably be expected to reach petitioner in time for compliance with board orders during the month of February, 1955. 20

TWO

The District Court committed reversible error in refusing to give petitioner's Requested Instructions Nos. 45 and 46, which put to the jury the petitioner's theory concerning the receipt by the board of the card mailed at Los Angeles in February, 1955, notifying the local board of a change of address from Modesto back to San Diego, and the possible misfiling of it. . . 34

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Supreme Court of the United States

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No. 75

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UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit in this case is reported at 287 F. 2d 304 (December 24, 1960). It also appears in the record. [R. 246-257][1] It is Appendix A to the petition for writ of certiorari at pages 21-33. A dissenting opinion was written by Judge Jertberg. (287 F. 2d 312) It appears in the record. [R. 257-259] See Appendix A to the petition for writ of certiorari at pages 33-35. No opinion was written by the District Court.

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[1] Numbers appearing herein within brackets and preceded by "R." refer to pages of the printed record in this case.

JURISDICTION

The judgment of the Court of Appeals was entered December 24, 1960. A petition for rehearing was duly filed and ordered overruled on February 2, 1961. [R. 260] The time for filing a petition for writ of certiorari was duly extended to April 3, 1961. [R. 261] The petition was filed April 1, 1961. [R. *cover*] Jurisdiction of this Court is, therefore, properly invoked under 62 Stat. 928 (1948), 28 U.S.C. § 1254(1). See also Rules 37 (b)(2) and 45(a), Federal Rules of Criminal Procedure. The District Court had jurisdiction of the indictment under 62 Stat. 826 (1948), 18 U.S.C. § 3231.

QUESTIONS PRESENTED

I.

Whether the conviction based on an indictment that, under the court's charge, limited the offense to the month of February, 1955, should have been reversed because the draft board records and the testimony of the clerk as to her own knowledge showed that petitioner had before and during February, 1955, informed the local board not only of the Modesto address but also of his permanent San Diego address, where mail would always reach him during the month of February, either directly or by forwarding of mail, and petitioner's knowledge and belief that these were sufficient notice, prevent an affirmance of the conviction.

II.

Whether the trial court committed reversible error in refusing to give petitioner's Requested Instructions Numbers 45 and 46, which put to the jury petitioner's theory concerning the mailing of the card at Los Angeles in February, 1955, notifying the local board of his return from Modesto to San Diego, especially when the charge of the court to the jury did not cover the issue.

STATUTE INVOLVED

Section 12(a) of the Universal Military Training and Service Act (50 U.S.C. App. § 462(a)) provides:

> "* * * Any * * * person * * * who * * * refuses * * * service in the armed forces * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title * * * shall upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. * * *"

REGULATIONS INVOLVED

Section 1602.4 of the Selective Service Regulations (32 C.F.R. § 1602.4) reads as follows:

> "*Delinquent.*—A 'delinquent' is a person required to be registered under the selective service law who fails or neglects to perform any duty required of him under the provisions of the selective service law."

Sections 1641.3 of the Selective Service Regulations (32 C.F.R. § 1641.3) reads as follows:

> "*Communication by Mail.*—It shall be the duty of each registrant to keep his local board advised at all times of the address where mail will reach him. The mailing of any order, notice, or blank form by the local board to a registrant at the address last reported by him to the local board shall constitute notice to him of the contents of the communication, whether he actually receives it or not."

Section 1642.1 of the Selective Service Regulations (32 C.F.R. § 1642.1) reads as follows:

> "*Regulations Governing Delinquents.*—Delinquents,

as defined in section 1602.4 of this chapter shall be governed by the provisions of this part and such other provisions of the Selective Service Regulations as are not in conflict therewith."

Section 1642.41(a)(b) of the Selective Service Regulations (32 C.F.R. § 1642.41(a)(b)) reads as follows:

Report of Delinquent to the United States Attorney. —(a) Every registrant who fails to comply with an Order to Report for Induction (SSS Form No. 252) or an Order for Transferred Man to Report for Induction (SSS Form No. 253) shall be reported promptly to the United States Attorney on Delinquent Registrant Report (SSS Form No. 301): Provided, That if the local board believes by reasonable effort it may be able to locate the registrant and secure his compliance, it may delay the mailing of such Delinquent Registrant Report (SSS Form No. 301) for a period not in excess of 30 days. A copy of such Delinquent Registrant Report (SSS Form No. 301) shall be placed in the delinquent's Cover Sheet (SSS Form No. 101). The local board may report any other delinquent registrant to the United States Attorney by letter stating all the circumstances. A copy of such letter shall be placed in the delinquent's Cover Sheet (SSS Form No. 101).

(b) In endeavoring to locate and to secure the compliance of a delinquent prior to reporting him to the United States Attorney, the local board should contact the delinquent and the "employer" or "person who will always know" the delinquent's address, as shown on the Registration Card (SSS Form No. 1), or any other person likely to know his whereabouts. The local board may enlist the aid of local and State police officials or any other public or private agencies it deems advisable. In no event shall the local board order or participate in the arrest of a delinquent.

STATEMENT OF THE CASE

This case has a long history. (See *Venus* v. *United States*, 266 F. 2d 386 (9th Cir. 1959).) Petitioner was charged by indictment on August 8, 1957, with only one offense, that of failing to report for induction on November 8, 1955, at San Diego, California. [R. 1-2] He pleaded not guilty to this indictment and during November, 1957, he was convicted of that offense and appealed to the Court of Appeals. The Court of Appeals reversed the conviction because of errors committed by the trial court in charging the jury and in refusing to grant certain requested instructions upon the law and the facts.—266 F. 2d 386 (Jan. 8, 1959).

Following the reversal of the conviction the original indictment was tried twice to a jury, resulting on each occasion in a mistrial because of a hung jury. [R. 6-7]

The Government, following the third trial, procured a second indictment containing two counts on December 23, 1959. The first count of this new indictment charged petitioner with the offense of failing to perform a continuing duty to report for induction in April, 1956. The second count charged petitioner with the offense of failing on or about February 1, 1955, to keep his local board notified of an address "where mail" would reach him at all times. [R. 3-4] He was not indicted for failing to perform a continuing duty after February, 1955. The commission of the offense was limited to "on or about" February 1, 1955. [R. 3-4] The instruction of the trial court limited the issue strictly to the month of February. [R. 179, 185] This was approved by the Court of Appeals as the law of the case. [R. 253-254]

The case (two indictments containing one and two counts respectively) proceeded to trial before a jury on May 5, 1960. The evidence was concluded on May 10, 1960. Petitioner made an extensive motion for judgment of acquittal at the close of all the evidence. [R. 162-168] The

trial court denied the motion for judgment of acquittal. [R. 168]

Extensive requested instructions were submitted to the court by both parties. [R. 161-162] Exceptions were taken by the petitioner to the refusal of Instructions Numbers 45 and 46. [R. 17-18, 162] The case was then argued to the jury on May 11, 1960. The charge to the jury by the court began on May 11 and was concluded on May 12, 1960. [R. 169-193] The jury was kept by the court to deliberate for three days and finally reached a verdict late on Saturday afternoon, May 14, 1960. [R. 18, 200-201]

The verdict rendered by the jury found petitioner guilty on only one count, the last count of the second indictment. The jury reported that it was unable to agree on the first indictment and on count one of the second indictment. [R. 18, 200-201] The trial court discharged the jury as to the first indictment and the first count of the second indictment. [R. 201]

Petitioner renewed his motion for judgment of acquittal promptly after the verdict on count two of the second indictment. [R. 32-38, 203, 204] The trial court, over the objection of the United States Attorney, dismissed the first indictment and the first count of the second indictment on its own motion "in the interest of justice on the grounds that there have been four trials." [R. 204] The trial court then overruled the motion for judgment of acquittal as to the second count of the second indictment and held that there was some evidence to support the jury's verdict on the last count of the second indictment. [R. 204]

A motion for a new trial was made. [R. 20-25] It was also overruled. [R. 207]

Petitioner was sentenced to the custody of the Attorney General for a period of three years and ordered to pay a fine in the amount of $500. [R. 40, 207-208] He duly appealed to the Court of Appeals. [R. 41] The Court of Appeals affirmed the conviction. [R. 245-260]

The draft board file of petitioner (except for certain excluded parts) was received into evidence as Government's Exhibit 1. [R. 51] Such file is contained in three cover sheets, which, on the outside, show the many notifications of changes of address by petitioner. [R. 61-65] The three different cover sheets were used by the local board as the basis of addressing cards and letters to the petitioner. [R. 65-66]

Entries on the cover sheet (part of Government's Exhibit 1) under "CHANGES OF ADDRESS:" are numbered, and they were based upon communications received from the petitioner by the board, indicating various changes of address as to where mail would reach him. The cover sheet appearing in Government's Exhibit 1 shows that petitioner notified the local board of six separate changes of address before October, 1955, when the order commanding him to report for induction issued. The local board received and made entries on the cover sheet of the six letters or cards received by it showing changes of address. [R. 211, 213, 215]

Entry number 6 of a change of address that was recorded by the local board on the cover sheet shows a letter was received from petitioner dated June 7, 1954. Such letter appearing in the file reads as follows:

"At this time I wish to inform you of my departure from San Diego to Modesto, California, because of secular employment. The Federal Bureau of Investigation I have notified when in Los Angeles after induction procedures. My new address is (Same employer) 1431 Tenth Street, Modesto, Calif., *but can be reached within one or two days, at my San Diego address.*" [R. 67, 232, 251, 258][2] The

[2] Emphasis is added to show that the local board never failed to know where petitioner could be reached. Also undisputed evidence shows petitioner was then out on bond pending a trial in Los Angeles of an indictment charging a violation of an earlier order to report for induction and no draft board action would be taken until the case was disposed of.

letter was enclosed in an envelope that showed the return address in San Diego. [R. 233]

Upon receipt of this letter by the local board in June, 1954, entry number 6 on the cover sheet under the heading "CHANGES OF ADDRESS:" was made. The entry reads as follows: "1431 - 10th St. 6-7-54, Modesto, Calif. (See letter inside)." [R. 66, 67] The longhand notation "(See letter inside)" for emphasis by the board was written in red on the original cover sheet. [R. 66] The clerk of the local board testified the one and only reason that she made the entry on the outside of the cover sheet opposite item number 6 under the heading "CHANGES OF ADDRESS:" was because, if petitioner could not be reached at the Modesto, California, address, the local board would "look for or try and contact him through his San Diego address." [R. 67]

The clerk of the board said that the board had been notified by petitioner that he had given his parents' San Diego address previously to the order to report and in the letter of June, 1954, as the place where he could always be reached. [R. 67, 68] The clerk testified that Venus was specifically requested, not only to give the address where he lived or resided, but also to give a reference of someone —his parents in this case—who would know his address or through whom mail would reach him. [R. 67-69] The official delinquency report in the draft board file showed that petitioner could always be reached through his father. [R. 75-76, 236]

The clerk testified that the statement appearing in the letter from Venus dated June 7, 1954, "but can be reached within one or two days, at my San Diego address," referred to the address of Venus' parents. [R. 68] This address was written on the outside of the envelope in which the letter came to the board as the *return address* of petitioner. This envelope was attached to the letter dated June 7, 1954, and appears in the file. [R. 232-233] Such envelope showed

the return address of Venus as 650 11th Street, San Diego. [R. 233] This is the same address that was recorded on the cover sheet under the heading "CHANGES OF ADDRESS:" and listed as item number 5. [R. 211]

The clerk testified that Venus had furnished the local board with the 650 11th Street, San Diego, address as his parents' address, where he could always be reached long previous to writing the letter of June 7, 1954. [R. 68]

Venus lived at Modesto, California, from June, 1954, to February 7, 1955, on which date he moved to Los Angeles to work at various places in Los Angeles County. From February 1 to February 8, 1955, mail admittedly would have reached him at Modesto. After February 8 to the end of the month, the 'cutoff' date according to the ruling of both courts below, mail would have been forwarded from Modesto to him by his employer who maintained a business until April, 1955, at the Modesto address given by Venus. [R. 105, 106. 120, 121] Venus had instructed him to do so. [R. 131] He did not leave a forwarding card with the Modesto post office because he knew everyone he corresponded with knew to reach him through his parents. [R. 112]

The father of Venus testified that promptly after making this move of the permanent address of petitioner he—the father—left a forwarding address with the San Diego Post Office, which notified that office that he had moved from 650 11th Street to 1120 30th Street, San Diego, which then was the permanent address of petitioner. [R. 156]

On or about February 19, 1955, after his return from San Diego, petitioner deposited a government post card in the United States Post Office at Los Angeles addressed to his local board, which was several months before the order to report was mailed, as appears below. [R. 106-110] He testified that this card was mailed, as above stated, after he had helped his parents move to 1120 30th Street, San Diego. [R. 108, 110] He also testified that the card notified

the board of the 1120 30th Street address in San Diego. [R. 132, 135] His testimony was fully corroborated by that of a friend and fellow worker. [R. 144-146]

In the same mail, according to undisputed testimony, Venus deposited a letter properly stamped and addressed to Bertha Leonard in San Diego that enclosed a postal money order that was received by her in due course of the mails. [R. 107, 108] She received it and so testified. [R. 154] So did his friend who saw him deposit it in the mails. [R. 145-146]

Long after Venus moved from Modesto and months after the February 'cutoff' date the local board prepared and mailed to him at the Modesto address an order to report for induction. It was dated October 28, 1955, and commanded him to report for induction at San Diego in November, 1955. [R. 53] The order was placed in an envelope addressed to 1431 10th Street, Modesto, California, and not to the permanent San Diego address shown in the communication of June, 1954, to the board. [R. 54] One of the three cover sheets showing the 1431 10th Street, Modesto, address was used in the preparation of the order and the envelope in which it was mailed. [R. 62] It was obviously one of the several cover sheets that failed to show the words: "See letter inside" that identified the San Diego address. [R. 213, 215] Using the wrong cover sheet may have caused oversight of the parents' address in the file that was noted on the original cover sheet.

The order to report for induction was never received by Venus at his San Diego address. There may have been several reasons. One: the building at the Modesto address where he lived and worked was torn down in April, 1955, and thereafter no longer existed and did not exist in October, 1955. Two: Venus had not left a forwarding address from the Modesto address back to his San Diego address at the post office in Modesto. [R. 112, 130-131] The reason for this omission was that petitioner assumed the local

board had received the card showing a change of address that he mailed to the local board from Los Angeles in February of 1955, the same as it had received five other such notices and, because of this belief, did not leave a forwarding address with the post office in Modesto, especially since he had notified the board in June of 1954 of the address of his parents in San Diego as a place where mail would alway reach him. [R. 130-131]

Venus testified, however, that had mail been received by his former employer, Morrison, in Modesto he would have forwarded it to Venus at San Diego at any time through the month of April, 1955. [R. 131] Even after Venus left Modesto there was mail from the United States Marshal pertaining to his court appearances in Los Angeles that was received by him through his parents' San Diego address when addressed to it as he had notified the board to do but which it did not do. [R. 138, 139]

The local board admittedly never attempted to locate Venus at the San Diego address because the draft board mail that had been sent to him at the Modesto, California, address had never been returned to the local board by the post office. [R. 68-69, 73, 75, 76-77]

In February, 1955 (the only material time involved in the trial and on appeal), the draft board file was out of the possession of the board in San Diego. It had been for months in the hands of Selective Service officials in Los Angeles so that it could be used in a trial of Venus for an earlier refusal to comply with an order of the local board issued in 1954. [R. 77-78] The card mailed by Venus in February, 1955, notifying the board of a change of address, was not placed in his draft board file and may have been misfiled, according to the clerk of the local board even if it were received. [R. 86] The clerk testified that she did not remember receiving the change of address card only because it could not be found in the file. She had no recollection independent of this failure to find the card. [R. 86]

Upon the fourth trial the clerk, when asked, said that a search for the February, 1955, card had first been made after the third trial. [R. 89] The search was directed by the United States Attorney. [R. 89] It was in only 3,000 out of 14,000 files and five years after the controversy arose. [R. 89-93]

Venus did not learn of the existence of the October, 1955, order to report for induction until April, 1956, when he was interviewed by an F.B.I. agent. [R. 112] He wrote the local board after the interview with the F.B.I. agent, who failed to advise what to do except for Venus to write the board, which he did, but he received no answer to his letter to the board as to what to do. [R. 237, 243] The local board then made a notation, however, of his new address at 756 Pier Avenue, Santa Monica, California, on April 10, 1956, and later, on November 15, 1956, noted another change of address to 302 Market Street, Venice, California. All of these many notices, seven or eight in all, were long before the indictment charging Venus with a failure to keep the local board informed of a place where mail would always reach him during February, 1955, which time was a mere short interval between many notices and was also eight months before the board mailed the order to report in the latter part of October, 1955. [R. 211, 212, 213]

For a briefer statement of the facts see the dissenting opinion of Judge Jertberg. [R. 257-259] Compare the statement in the opinion of the majority of the court below. [R. 246-248, 250-252]

SUMMARY OF ARGUMENT

ONE

This Court should hold that the motion for judgment of acquittal was erroneously overruled by the District Court because (1) the undisputed evidence shows that the petitioner was not guilty of unlawfully failing to keep his local board advised of an address where mail would reach him at all times, (2) the evidence wholly fails to show any willful and knowing violation of the law, (3) the evidence is as consistent with innocence as with guilt and (4) the draft board file showed two addresses at which mail could reasonably be expected to reach petitioner in time for compliance with board orders during the month of February, 1955.

The ruling of the District Court, approved by the Court of Appeals, that the jury should be restricted to the month of February, is the law of the case. It was error for the Court of Appeals later on in the opinion to hold that petitioner violated a continuing duty that extended to October, 1955, an eighteen-month period from June, 1954. (*Venus* v. *United States*, 287 F. 2d 304, 308, 309-310, 311) The violation of a continuing duty is a separate offense under the regulations, which was not charged in the indictment.--*Graves* v. *United States*, 252 F. 2d 878 (9th Cir. 1958).

Holding the petitioner guilty through October, 1955, is contrary to the evidence. At all times from June, 1954, to February, 1955, mail would have reached him, under the direction of his June, 1954, letter, at the San Diego address of his parents.

The court below shifted the issue of liability under the indictment from February, 1955, to October, 1955, thereby invoking a continuing duty not alleged in the indictment.

It was error for the court below to hold that Venus no longer complied with the law after February 1, 1955, because this is contrary to the record showing without dispute that he would have received mail in Modesto up to Febru-

ary 8, 1955, and thereafter at his San Diego address in accordance with directions in his letter of June 7, 1954. That he failed to leave a forwarding card at the post office in Modesto is immaterial, because he knew that mail would reach him at San Diego, his usual correspondents being informed or instructed to send mail to him there at San Diego.

The court below properly assumed that mail addressed to petitioner would reach him during the first eight days of February but improperly assumed that it would not thereafter. The latter assumption is contrary to the instructions in the letter of June 7, 1954, to the board that he could be reached through his parents in San Diego.

The holding of the court below that it could assume that mail would not reach Venus during the month of February, 1955, is contrary to *Bartchy* v. *United States*, 319 U. S. 484 (1943). That decision held that if a registrant notified the board of an address that he believed would cause draft board mail to reach him he is not in violation of the regulations. The holding of the court below substitutes the assumption of the court after the fact for the reasonable assumption of petitioner based upon the transactions during the time they occurred.

One fact disputing the holding of the court below that mail would not have reached Venus at the San Diego address during the month of February, 1955, or until October, 1955, is the draft board file itself. The file shows that on May 4, 1954, an order to report for induction reached Venus through the 650 11th Street address. If that order to report reached him before June 7, 1954, then how can the court below, under any theory, contend that the October, 1955, order would not have reached him a year and six months thereafter?

It was wrong for the court below to hold that the 650 11th Street address was not petitioner's address but only that of his parents. The record shows that this was

petitioner's permanent address even though it was his parents' home. The clerk unequivocally testified that she knew he could always be reached through his parents and that she knew the address was his home. The delinquency notice, dated January 3, 1956, named his father, John Venus, as the one who would always know his address.

The court below found that no mail was directed to Venus during February, 1955. It was speculation that mail directed to him during that month would not have reached him either at Modesto or at San Diego.

It is true that the order of October, 1955, did not reach Venus. This is no proof that Venus did not have a basis for a reasonable belief that mail would reach him from the board based on the June 7, 1954, letter. Since this letter supplied reasonable basis for such belief, then it is immaterial that the order of October, 1955, did not reach him.

It is error to speculate on circumstantial evidence that is as consistent with innocence as with guilt in order to fix willful and knowing violation of the law.

The Government was required to prove guilt beyond a reasonable doubt. The only way to prove beyond a reasonable doubt that mail would not have reached him during February, 1955, would be to show that mail was sent to him during that month and was returned unclaimed. The Government did not do this. The Government was content to rely on the nonreceipt of the October, 1955, order. In the absence of more there is nothing in the case but pure speculation that mail would not reach him during the month of February, 1955, either at Modesto or at San Diego.

Since a great multitude of uneducated, untrained and ignorant registrants are among the many millions involved with the draft law the court below should have been less strict and more reasonable in its interpretation of the Act. There are millions of untrained and uneducated men so involved. Even well-educated men are not skilled in draft procedure. The law requires that registrants be dealt with

as though they are not litigants represented by counsel, the court below to the contrary notwithstanding. Even the trial court, as requested by petitioner, charged the jury specifically and expressly on this point. [R. 179]—*United States ex rel. Berman* v. *Craig*, 207 F. 2d 888, 891 (3rd Cir. 1953); *United States* v. *Greene*, 220 F. 2d 792, 794 (7th Cir. 1955).

The fact that petitioner did not exhaust his administrative remedies by appealing the classification or reporting for and thereafter refusing to submit to induction proved that he did not receive the classification card and the order. He had previously taken both of these steps in 1954.

The court below employed afterthought viewpoint of the fact rather than the facts as they appeared to Venus, which is contrary to *Bartchy* v. *United States*, 319 U. S. 484 (1943). The question of his guilt is not to be based upon the assumption of the court below but upon the reasonable assumption of petitioner.

Prosecution of the second count of the second indictment is a needless prosecution and involves nonexistent draft board procedure and pure speculation. The file was out of the hands of the local board for use in prosecution of the 1954 indictment at Los Angeles, from November, 1954, to July, 1955. This made impossible any draft board proceedings during February, 1955, the crucial month. The failure to keep the board informed during that time is purely hypothetical and moot as far as any draft board proceedings were concerned.

The local board violated Section 1642.41 (a) (b) of the Selective Service Regulations (32 C. F. R. §1642.41 (a) (b)) by making no effort whatever to locate Venus as a delinquent and find out if he failed to comply with the law. Remember that he had always co-operated in every way. The clerk knew that he could always be reached through his parents in San Diego.

Had the board reached Venus it would have discovered the fact that he was not delinquent and that the board had made a mistake by not trying to reach him in care of his parents in San Diego, as he had said in his June 7, 1954, letter to the board. It would have shown to the board that Venus was in the dark as to what was going on. The board would have learned before reporting him to the United States Attorney that he had not received the classification card or the order to report at the address shown in his June 7, 1954, letter to the local board. The purpose of the above-mentioned regulation is to raise an army rather than to imprison men through delinquency proceedings, and hence the duty to first make an effort to reach the registrant.

Petitioner was a victim of an unfortunate set of circumstances and bizarre possible errors of postal and draft board administrative proceedings. The failure of the two draft board communications to reach him and the claimed failure of his post card to reach the board is extraordinary. The failure to send the order to San Diego may be due to a draft board error. The original cover sheet had become worn out. On that cover sheet were the red warning words opposite the June 7, 1954, communication from Venus: "(See letter inside)." This letter told the board he could be reached in care of his parents in San Diego.

In preparing the first and second new cover sheets these warning words were omitted. One of these new cover sheets was used in addressing the classification card and the order to report mailed to Modesto, rather than the original cover sheet with the warning words on it which was inside the file. The obvious reason the card and order were mailed mistakenly to Modesto instead of San Diego was the clerk's overlooking the warning words "(See letter inside)" on the original cover sheet inside the newer one.

This case is controlled by *Bartchy* v. *United States*, 319 U. S. 484 (1943) and *Ward* v. *United States*, 344 U. S. 924 (1953).

TWO

The District Court committed reversible error in refusing to give petitioner's Requested Instructions Nos. 45 and 46, which put to the jury the petitioner's theory concerning the receipt by the board of the card mailed at Los Angeles in February, 1955, notifying the local board of a change of address from Modesto back to San Diego, and the possible misfiling of it.

Requested Instruction No. 45 involved the factual issue of whether the draft board actually received the post card from the petitioner. [R. 17-18] There was great uncertainty and doubt as to whether the card was received and misfiled according to the clerk's testimony. [R. 86] Petitioner's testimony and that of his supporting witness were that the prestamped government post card showing his change of address from Modesto to San Diego was actually deposited in the mails at Los Angeles after being duly addressed to the local board.

The file was out of the draft board office and in the possession of the Selective Service at Los Angeles and Sacramento. Only a dummy file was in the draft board office. The clerk testified that the practice was to file mail of a registrant whose file was out of the office in a dummy file. She testified that she had no independent recollection of whether the post card was received. Her testimony was based exclusively on her inspection of the files after the indictment was returned several years after the card was mailed.

Who knows what happened to the post card, if it were received, from June, 1954, to the date of the trial? The clerk merely testified that the card was not located in the file. This testimony did not prove that the card was not received. It could have been received and misfiled.

This vital issue was never put to the jury. The only thing the court covered in the charge was presumption of receipt by the board and this only if the jury believed that Venus actually mailed the post card as testified. This was

not enough. The jury also was allowed by the trial court to consider the fact that the draft board clerk's not finding the card in the file was proof that it was not mailed.

With the danger of this thought causing the jury to believe that the card was not mailed, it was necessary for the court to charge that the presumption that employees do their duty was not conclusive proof that the card was not received by the witnesses who handled the mail. Petitioner was also entitled to have the jury consider the fact that the employees may not have done their duty but made a mistake and misfiled it. See Requested Instruction No. 45. [R. 17-18]

Requested Instruction No. 46 more specifically covered the subject that the presumption of receipt of the card cannot be overcome or rebutted by the presumption that the board employees performed their duties and that it was incumbent upon the Government to prove by the witnesses who handled and processed the incoming mail that the card was not actually received by the local board. [R. 18]

Requested Instructions Nos. 45 and 46 were not ultimate issues to be determined by the jury. They dealt with a very vital and crucial evidentiary question that was incidental to the ultimate issue of fact of whether the card was actually mailed. The charge of the court at first pivoted, at three different places, the question of guilt or innocence purely upon whether the card was actually mailed in Los Angeles as claimed by Venus.

The theory of petitioner was that the card was mailed, received and misfiled by board employees. It was a very vital thing for the jury to consider that the card was misfiled by board employees as proof that petitioner actually mailed it. Since the court had pivoted the entire matter on the mailing of the card and did not at any place in his charge allow the jury to consider whether board employees had misfiled it, it was imperative that the court cover the points in the charge as requested in Instructions Nos. 45 and 46.

ARGUMENT

ONE

This Court should hold that the motion for judgment of acquittal was erroneously overruled by the District Court because (1) the undisputed evidence shows that the petitioner was not guilty of unlawfully failing to keep his local board advised of an address where mail would reach him at all times, (2) the evidence wholly fails to show any willful and knowing violation of the law, (3) the evidence is as consistent with innocence as with guilt and (4) the draft board file showed two addresses at which mail could reasonably be expected to reach petitioner in time for compliance with board orders during the month of February, 1955.

The District Court ruled that the consideration of the jury about petitioner's guilt or innocence would be restricted exclusively to the month of February. Nothing after the last day of that month was material or could be considered. [R. 179, 185] The Court of Appeals held that this was a proper instruction and that it would be taken as the law of the case. (287 F. 2d 304, 309-310) [R. 253-254] These holdings of the court below became the law of the case.

It could not reasonably be extended beyond the month of February since there was no allegation in the indictment as to a continuing duty. Inconsistent with this holding the court below refers to mail (two letters) being sent to the petitioner by the board at Modesto in September, 1955, and October 28, 1955. (287 F. 2d 308, 310)

The court below then refers to the 18-month period from June, 1954, to the end of 1955 as a period that petitioner knowingly violated the law and added that he had a "continuing duty during that 18-month period." (287 F. 2d 311) This holding was not only inconsistent with the holding that the cutoff was the month of February but it was also in direct conflict with an earlier holding by the court below that a continuing duty could not be relied upon un-

less alleged in the indictment.—*Graves* v. *United States*, 252 F. 2d 878 (9th Cir. 1958).

The reason by which the court below makes the above holding is a mystery and is contrary to fact. There is not one shred of evidence to support it. The record points to the contrary. It shows that mail sent to Venus from June, 1954, until February 8, 1955, would have reached him at the Modesto address or the San Diego address.

The month of February, 1955, is the crucial month. What happened before February is irrelevant and immaterial. What happened after February, 1955, is also irrelevant and immaterial under the ruling of the trial court, with which the court below could find no error.

The court below shifted the theory of guilt and approved conviction of petitioner of a false charge for failure to perform a *continuing duty*, an act with which he has never been charged by indictment as required by law. The trial court, moreover, excluded the theory of continuing duty. With five years of opportunity to review the file and prosecute, even the Government has never made such a charge as that conjured up by the court below.

In the opinion, the court below states: "After that time he no longer complied with the law with which he was so familiar." (287 F. 2d 310) This reference is made to the period of time subsequent to February 1, 1955, which is entirely immaterial to the February limitation by the court. Yet the court below makes this statement in face of the facts: (1) during the period of time from February 1, 1955, to June, 1955, the registrant was under a prior indictment and was appearing in court monthly for the purpose of trial, which trial was continued from time to time; (2) he was appearing openly and notoriously before United States district judges, prosecuting attorneys, marshals and his own counsel, all in an effort to take every step to protect his rights allowed by law; and (3) the file was out of the hands of the board and no correspondence was going on between the board and Venus.

The evidence, without dispute, shows that petitioner would have received mail while in Modesto up until February 8, 1955, the date that he moved from there. This Court should also conclude that mail would have reached Venus through his parents' old address up until February 21, 1955, the date that he helped his parents move to the new address. The Court should equally conclude that mail would have reached Venus in San Diego at the new address of his parents from February 21 to February 28, 1955, because his father filed a forwarding address with the post office.

Even during the entire month of February, including the last seven days, Venus' employer in Modesto could have and would have forwarded mail to him (as he had been doing for him on previous occasions) and also his parents would have and could have forwarded mail to him if it had been directed to the San Diego address, as was done previously.

In affirming the conviction the court below completely disregarded the following undisputed facts: (1) petitioner had reasonable and full cause to believe that mail would be sent to him at San Diego in event it did not reach him in Modesto; (2) he had failed to leave a forwarding address at Modesto because he assumed he would receive mail through his San Diego address; and (3) he had no notice whatever of the card mailed notifying him of the classification in September, 1955, and no notice whatever of the order to report for induction mailed in November, 1955.

In the face of the undisputed evidence in this case showing that Venus could reasonably expect that mail would reach him during the month of February at the San Diego address given the board in the letter of June 7, 1954, then the sole basis for the conclusion of the court below that the petitioner was guilty is that there is no official notice in the draft board file covering the month of February. It is unjust and unreasonable in these circum-

stances to affirm the conviction of Venus for a violation of the Act and regulation solely because he did not act immediately after February 21, 1955, and before February 28, 1955, by writing another letter.

The court below states "we might assume, although there is no proof of the fact, that mail directed to appellant by the local draft board during *the early days* of February to the Modesto address would have reached him. We cannot assume that mail directed by the local draft board during the month of February, but after the early days thereof, to the appellant at the Modesto address would have reached him." (287 F. 2d 310)

Before discussing in detail the facts which disclose the error of the court below in the making of this statement it should be observed that the court below states "we might assume" and again states "We cannot assume." The question of guilt is not based upon the *assumption of the court below* about whether mail would reach Venus during the month of February, 1955. The question of guilt is based on whether *Venus could reasonably assume* or reasonably expect that mail would reach him at either one of the addresses given by him in the letter of June, 1954. The court below did not discuss the question of whether or not Venus could reasonably assume that mail would reach him during the month of February. The court below, to the contrary, defied this commandment of reasonable assumption of the registrant laid down by this Court in *Bartchy* v. *United States*, 319 U. S. 484 (1943).

One of the most striking pieces of evidence in the draft board file that points out that Venus could reasonably have expected to receive mail from the board at 650 11th Street, San Diego, California, is that on May 4, 1954, as shown in the registrant's file, an order to report for induction was mailed to him at 650 11th Street, San Diego, California, and he received it through his parents. Since he had received this prior order to report when it was addressed to this

address, it is stretching the imagination of man too far to come to the conclusion that he could not reasonably have expected in February, 1955, to receive mail at this address in time for compliance with any orders contained in such mail sent during February.

The court below states that 650 11th Street, San Diego, California, on June 7, 1954, was not then the address of petitioner's parents. This conclusion is reached by the studied effort to peruse the registrant's file and learn that six years have elapsed since the registrant first signed up with the draft board when he listed his parents' address and had never sent in an official form changing their address. Yet the cover sheet shows that in 1952 he used the 650 11th Street address and once again in the letter of 1954 addressed to the board with the return envelope showing 650 11th Street, San Diego, California. Even though no official memorandum in the file stated that 650 11th Street was the parents' address, the clerk of the local board knew this as a matter of fact and she also knew this was the permanent home of Venus and so testified to both facts.

This is one issue on which the evidence is unerringly in favor of petitioner, and, rather than answer the point, the court below disregarded it. The court failed to discern (1) that the address given at 650 11th Street, as stated in the June 7, 1954, letter was one of the petitioner's two addresses at which he could be reached and (2) nowhere in the record does petitioner claim that the reason this address was given was because it was the address of his parents, but the record shows that this was his permanent and own home address, at which mail would reach him "through his parents." To blandly state that this "is beside the point" is to ignore the regulation (32 C.F.R. § 1641.3) and to disregard the ruling of this Court in *Bartchy* v. *United States*, 319 U. S. 484 (1943).

The holding of the court below disregards entirely the testimony of the draft board clerk that the board knew and

she knew petitioner could be reached at all times in care of his parents' San Diego address. Even the delinquency notice, dated January 3, 1956, reporting Venus as a delinquent for failing to report on October 28, 1955, shows the person who would always know the petitioner's address was John Venus whose address is shown erroneously in the form as 184 National Avenue, National City, California. [R. 235-236] The testimony of the clerk is undisputed that she knew 650 11th Street as the address of the father. [R. 68] The envelope containing the letter of June 7, 1954, showed the 650 11th Street address. [R. 233]

The court below conceded that no mail was ever directed to the petitioner during the crucial month of February. If no mail is directed to a man at either one of two addresses where he is employed or where his parents are living, then how, within the realm of any recognized rule of law, could the court below come to the conclusion—without wild speculation—that the Government has proved that mail would not reach the registrant at either one of those two addresses during that period?

How could the court below speculate on circumstantial evidence and find willful and knowing violation of the law during February, 1955? Surely reason and justice do not compel a conclusion on nothing but circumstantial evidence that there was a willful and knowing violation of the law by failing to give the board the new San Diego address during the last seven days of February. The most that can be made out of this is that the evidence is as consistent with innocence as it is with guilt; and since the jury and the court below were required to speculate willful and knowing violation of the law, the verdict of the jury on this point should be set aside and the holding of the court below should be vacated because of no evidence and for speculation.

The only possible way by which the Government could prove beyond a reasonable doubt that mail would not have reached the petitioner at either of these addresses during

the month of February, 1955, would have been to address such mail to petitioner and then show that he failed to receive it. This the Government did not prove and could not prove because no such correspondence was mailed.

The only other method of proving that mail would not have reached him in time for compliance is solely by circumstantial evidence. In this field of circumstantial evidence the undisputed evidence shows that for the first eight days in February the registrant actually was at the Modesto address.

The court below, in refusing to recognize the undisputed evidence, dealt harshly with petitioner, and to elude the facts it had to treat him as if he were a lawyer before the draft board. It made the regulation a gin. Section 1641.3 of the Selective Service Regulations (32 C.F.R. § 1641.3) was construed by the court below, in this case, so as to make it a snare to entrap the innocent and allow the Government to use it as a dragnet by which to convict when there is no evidence of guilt.

The court below ignored the fact that there are millions of uneducated and untrained registrants that are involved under the draft law. The petitioner in this case acted like any other reasonable and prudent draft registrant untrained in the law. He should be given the same benefit that the law accords to a farm boy, a factory worker or any other registrant untrained in the law. It is wholly irrelevant and immaterial that the petitioner had or had not complied with the law on previous occasions. It is irrelevant that the petitioner knew about the requirement of the regulation to keep the draft board advised where mail would reach him at all times. In view of the fact that draft registrants, millions of them, are uneducated other courts have rejected the argument that registrants should be dealt with as though they were litigants represented by counsel as did the court below in this case. (*United States ex rel. Berman* v. *Craig*, 207 F. 2d 888, 891 (3rd Cir. 1953); *United States* v. *Greene*,

220 F. 2d 792, 794 (7th Cir. 1955)) The trial court charged the jury as held in these cases. [R. 176]

The court below held, in substance, that men of ordinary affairs, such as is this petitioner, may not use their family address (which is their permanent address), in place of their temporary place of abode, and reasonably expect to receive mail through it. This is in direct violation of the common everyday course of human affairs in well-known family relationships between parents and children who are adults to use the address of their parents, especially when they are traveling salesmen or seamen. But such a way of life the court below was willing to sidestep in order to sustain a conviction. It also violates the principle of the two decisions last above cited.

The question of guilt is not based upon the *assumption of the court below* about whether mail would reach Venus during the month of February of 1955. The question of guilt is based on whether *Venus could reasonably assume* or reasonably expect that mail would reach him at either one of the addresses given by him in the letter of June, 1954. The court below did not discuss the question of whether or not Venus could reasonably assume that mail would reach him during the month of February. The court, to the contrary, defies this commandment of reasonable assumption of the registrant laid down by this Court in *Bartchy* v. *United States*, 319 U. S. 484 (1943), above stated.

The court below took the viewpoint of looking at the facts as they appeared to the court as an afterthought, not as they appeared to Venus during the draft board proceedings. This is like the illegal practice in cases of self-defense in murder prosecutions, to look at the facts as they appeared to the court after the fulmination resulting in a shooting instead of viewing the facts as they appeared to the defendant. The court below overlooked the principle of *Bartchy* v. *United States*, 319 U. S. 484 (1943), that if a registrant could reasonably do what he had done in writing the board and notifying other persons about his whereabouts

that, reasonably, mail directed to him would reach him. The court below did not take this view. It is submitted that this Court will view the facts from the standpoint of the registrant. If Venus could reasonably have expected that mail would reach him in time for compliance at either one of the addresses given in the letter of June, 1954, then the petitioner is not guilty as a matter of law. It was error for the court below to conclude, in the face of the record in this case, that Venus could not reasonably expect mail to come into his hands at either one of the addresses given in the letter of June, 1954, during the month of February, 1955.

A very significant fact corroborates the contention of the petitioner that he did not receive either the draft board card mailed in September, 1955, or the induction order mailed in November, 1955. It is that the petitioner did not exhaust his administrative remedies by appealing the 1-A classification made in September, 1955, or by reporting for induction and refusing to submit to induction in November, 1955.

The draft board record shows that he had previously taken both of these steps and exhausted his remedies for the defense of the prosecution instituted in 1954 at Los Angeles and later dismissed. It is unreasonable to assume that a registrant who is a conscientious objector or a minister would deliberately refuse to exhaust his administrative remedies when he knows the steps required by law, as did the petitioner.—*Smith* v. *United States*, 327 U. S. 114 (1946); *Falbo* v. *United States*, 320 U. S. 549 (1944); *Williams* v. *United States*, 203 F. 2d 85, 87 (9th Cir. 1953), cert. denied 345 U. S. 1003 (1953); *Skinner* v. *United States*, 215 F. 2d 767 (9th Cir. 1954), cert. denied 348 U. S. 981 (1955); *Frank* v. *United States*, 236 F. 2d 39 (9th Cir. 1956); *Prohoroff* v. *United States*, 259 F. 2d 694 (9th Cir. 1958), cert. denied 359 U. S. 907 (1959), reh. denied 359 U. S. 962 (1959).

The prosecution of the second count of the second indictment appears to be an unjust prosecution. It would accomplish nothing because there was no real violation.

There was no actual or intended injury to the Government. It was legally impossible for the draft board to take any action whatever while the draft board record was out of its hands and was being held by the State Director to be used in the prosecution for the refusal to submit to induction in July, 1955. Admittedly, the file was out of the hands of the draft board from November, 1954, to July, 1955. The failure, if any, to fully comply with the regulations about notification of change of address to the board was harmless error. The failure, if any, was entirely moot. The prosecution in this case for a harmless thing is like prosecuting a man for shooting a dead horse.

It is remarkable that the draft board never made any effort to locate Venus after the alleged delinquency. The official notice of delinquency made to the Department of Justice, however, stated that he was located, on October 28, 1955, in Modesto, California. [R. 236] This is a false statement appearing in an official record. [R. 68-69, 73, 75, 76-77]

The draft board knew that Venus had always co-operated and complied in former proceedings of the case right down to the point of answering an order to report for induction and refusing to submit, resulting in his first prosecution. The draft board file is replete with proof that Venus at all times co-operated. [R. 224-226] In view of this knowledge and belief on the part of the board, had there been a compliance by the board with Section 1642.41 (a)(b) of the Selective Service Regulations (32 C.F.R. § 1642.41 (a)(b)) there never would have been any basis for the indictment for failure to keep the local board informed.

The very purpose of the above regulation is to accomplish the intent of Congress in passing the law that was to raise an army and get men in the army rather than put them in prison. The court below and the draft board, acting together, have interpreted the regulation contrary to the intent of Congress. No effort was made to determine delinquency by trying to locate Venus before ordering the Department of Justice to put him in prison. This action

is manifestly contrary to the plain intent of the regulation and the spirit thereof, as well as the Act of Congress. Venus pleaded with the draft board in a long letter, dated September 4, 1956, showing that he had no knowledge of the classification card or of the order to report for induction. [R. 243]

Venus is the victim of an unfortunate set of circumstances resulting in his ignorance of what was going on in his draft board case. A cloud of doubt covers the entire case that makes the fair and the just conclude that the evidence in this case is as consistent with innocence at it is with guilt.

The only thing the court below had to support a willful violation of the Act and the Regulations is speculation and pure conjecture. Why was the card and the notice not mailed to his father's address in San Diego? Even the clerk of the draft board that prepared the two documents could not explain why they were mailed to Modesto when the board knew that he could always be reached through his parents in San Diego. Could it not be that the clerk, in dealing with Venus, inadvertently used the wrong cover sheet in preparing the documents?

The reason there were three cover sheets instead of the usual one was because of the multitudinous transactions requiring frequent handling of the draft board file and the mailing of it back and forth from San Diego to Sacramento and to Los Angeles. The minutes disclose the facts that produced the hardship and wear upon the first cover sheet. [R. 223-225] The clerk testified that the reason the two extra cover sheets [R. 213, 215] were made was because the first cover sheet became dog-eared and was coming apart, making it no longer suitable for the holding of draft board papers. [R. 61]

The original cover sheet (which was put inside of the file and the new cover sheets) is the only one that had on it the warning words "(See letter inside.)" [R. 66, 211, 213, 215] This notation referred to the letter of June 7, 1954, informing the board that he could always be reached

through his parents in San Diego. [R. 67] This fact was within the personal knowledge of the clerk who handled the mailing of all letters, notices and other documents from the local board.

The obvious reason that the two documents were mistakenly mailed to Modesto instead of to San Diego was that the new cover sheet did not have the same warning words "See letter inside" as did the original cover sheet. Had the new cover sheets had the same warning words on them the mail would have been sent to San Diego instead of to Modesto and this prosecution would never have resulted.

Another mystery is what happened to the card that Venus mailed from Los Angeles to San Diego notifying the board of his leaving Modesto and going to Los Angeles as well as notifying the board of a change of his permanent address, the home of his parents in San Diego. At the time the card was mailed from Los Angeles the draft board file was out of the office and there was a mere dummy file kept. The clerk testified that the card could have been misfiled and that may have been the reason that it could not be found in the file. [R. 86] The six-year belated search of the files through only 3,000 of the 14,000 files [R. 89-93] is not enough to dispel the doubt created by the admission of the clerk of the possible misfiling.

As to what happened to the two notices that were sent to Modesto, this still remains a mystery. Venus said he did not receive them. It is unreasonable to conclude that if he had received them he would have thrown them in the wastebasket or destroyed them. He knew he had to exhaust his administrative remedies by appealing from the classification and also by reporting for induction and refusing to submit to induction.

In the bizarre circumstances of this case it would be unjust to affirm the conviction, because the evidence is as consistent with innocence as it is with guilt. There

is no evidence of willful intent to violate the law, and the judgment should be reversed.

The court below has misinterpreted *Bartchy* v. *United States*, 319 U. S. 484 (1943), so as to reject it when the case obviously controls. It held that because the jury could not reasonably expect mail to come into Venus' hands in time for compliance he is guilty. The court below should have used the yardstick of 'could Venus reasonably expect that mail would reach him.'

In *Bartchy* v. *United States* 319 U. S. 484 (1943), this Court said that a registrant had performed his duties under Section 1641.3 of the regulations when he had, in good faith, provided a chain of forwarding addresses by which mail "sent to the address which is furnished the Board, may be by the registrant reasonably expected to come into his hands in time for compliance." The court below fails to point out a single shred of evidence by which any reasoning person could come to the conclusion that Venus could not reasonably expect in February, 1955, that mail would reach him at Modesto until the 8th or after that at 650 11th Street, San Diego. This is admittedly so during the period of time from February 1 to February 21, 1955, the latter date being the day Venus helped his parents move. It should also be held so for the succeeding seven days, during which the forwarding card filed by his father, with the San Diego post office address would have insured a receipt of mail.

The holding of the court below is diametrically opposed to *Ward* v. *United States*, 344 U. S. 924 (1953) (reversing *Ward* v. *United States*, 195 F. 2d 441). In this case Venus did identically what Ward did. (1) Ward gave the address of his employer as well as his residence address. In this case Venus gave the address of his employer in Modesto as well as the address of his parents, at which the record and the undisputed testimony of the clerk of the local board show was his permanent address through which mail would always reach him within two days. (2) In the

Ward case the board did not attempt to use the business address but used only the residence address from which Ward moved without notifying the board. In this case the board used the Modesto address of Venus' employer from which Venus had moved months before the order was mailed without notifying the board. (3) In this case the board made no effort to reach Venus through his parents' address, which was his permanent address, but attempted to reach him only through his employer's address in Modesto. The facts in the two cases are identical in effect. (4) In *Ward* v. *United States* (344 U. S. 924) Ward gave two addresses to the local board and the local board used only one, from which Ward had moved, and made no attempt to use the other. In this case Venus gave the board two addresses, one of which he had moved from, and the board admittedly made no attempt to use the other address.

It is manifest, therefore, that the distinction that the court below has drawn between *Ward* v. *United States* (344 U. S. 924) and the facts in this case is groundless and wholly without justification. So how could that court, under any circumstances, make a distinction between this case and *Ward* v. *United States* (344 U. S. 924)? Instead of petitioner misplacing reliance upon *Ward* v. *United States* (344 U. S. 924), the court below made a distinction without a difference.

It is respectfully submitted that petitioner should have been acquitted because (1) the undisputed evidence shows that the petitioner was not guilty of unlawfully failing to keep his local board advised of an address where mail would reach him at all times, (2) the evidence wholly fails to show any willful and knowing violation of the law, (3) the evidence is as consistent with innocence as with guilt and (4) the draft board file showed two addresses at which mail could reasonably be expected to reach petitioner in time for compliance with board orders during the month of February, 1955.

TWO

The District Court committed reversible error in refusing to give petitioner's Requested Instructions Nos. 45 and 46, which put to the jury the petitioner's theory concerning the receipt by the board of the card mailed at Los Angeles in February, 1955, notifying the local board of a change of address from Modesto back to San Diego, and the possible misfiling of it.

Requested Instruction No. 45 related to a highly disputed and important fact question for the jury to decide. [R. 17-18] The trial judge in his charge repeatedly and on several occasions informed the jury that the whole question of whether the petitioner was guilty or not in failing to keep the board advised of where mail could reach him at all times depended solely upon whether they believed he did or did not deposit the card in the mails in Los Angeles in February, 1955. The members of the jury were told that this was the crucial and important question for them to determine in reaching a verdict of whether petitioner was guilty or not guilty under the second count of the last indictment. [R. 178-179, 184-186, 190]

The trial court in charging the jury about the law of mailing merely referred to the presumptions that correspondence properly addressed, stamped and deposited in the mails is presumed to have been received in due course of mail and that the presumption of receipt could not be based upon another presumption, "that a public officer performed his or her duty in mailing a letter." [R. 175]

In connection with the charge on the mailing of the postal card, the trial court said nothing about the disputed question as to whether the card was actually received and misfiled by the board. Upon the trial petitioner and his witness Beil testified that the Government postal card containing notification of change of address was duly addressed and deposited in the United States mails at Los Angeles in February, 1955. [R. 106-110, 132, 135, 144-146]

The draft board file and the undisputed testimony of the clerk of the local board showed that the draft board file was out of the possession of the board in February, 1955, and was not returned until July of that year. [R. 77-78] The clerk testified that it was the practice to have a dummy file during the absence of any file from the board. She further testified that it was possible that the card was not received and, if received, may have been misfiled. [R. 86]

The sole basis for her testimony that the card was not received was merely that, on examination of the file after it was returned, the card was not in the file and that it would normally have been in the file if the normal practice and procedure of the office was followed by taking things out of the dummy file on return of the original file and placing them in the original file. She testified that because the card was not found in the file during the examination of it in preparation for the trial of this case it was never received by the local board. Albeit, she earlier testified that a mistake may have been made by the board in the handling of the card.

It is obvious from the testimony in the case that it was a question of fact as to whether the card was actually received and, if it was received, the card was misfiled and lost by the board after it was received. The Government merely relied upon the presumption that the draft board clerks did their duty in handling the mail.

On this important question of fact, as above stated, the trial court at no time presented the theory of the petitioner to the jury for its consideration as to whether or not the card was received and whether the draft board employees did their duty in handling it.

The trial court should have presented to the jury the proposition that the presumption that an employee does his duty could not substitute for evidence and testimony

that the card was received. This issue was specifically raised in petitioner's Requested Instruction No. 45.

The trial court, as above shown, merely gave a general instruction on the presumption of receipt of correspondence duly addressed, stamped and deposited in the mails. Petitioner was entitled to have an instruction to the jury that the presumption of the receipt of the card mailed by the petitioner in Los Angeles could not be overcome or rebutted by the mere presumption that the board employees performed their duties.

The trial court should have instructed that the burden was upon the Government to prove by testimony of the employees that the card was actually not received by the board. This issue of fact was specifically requested in petitioner's Requested Instruction No. 46.

These two instructions refused by the trial judge in this the fourth trial of this case are instructions that were identical to those among the group that were refused by the first judge who presided at the first trial of this case.

The court below on the first appeal said: "Furthermore, the theories of the defense were not presented. Many questions of fact were suggested by the defense upon which the court did not require the jury to find. The defense sufficiently raised these matters."—266 F. 2d 389.

It is suggested that for the same reason and because of the same error committed by the trial judge on the fourth trial of this case as was committed by the trial judge at the first trial of this case the court below should have reversed the conviction.

In *Rosenthal* v. *Walker,* 111 U. S. 185, 193 (1884), it was held that the presumption of delivery of a letter does not arise until the letter is "proved to have been either put into the post office or delivered to the postman, * * *."

In *Henderson* v. *Carbondale Coal and Coke Co.,* 140 U. S. 25, 37 (1891), the same holding was made. The Court said: "This is not a conclusive presumption, and it does

not even create a legal presumption that such letters were actually received, * * *." The Court went on to say: "But no such presumption arises unless it appears that the person addressed resided in the city or town to which the letter was addressed * * *."

In *Schutz* v. *Jordan*, 141 U. S. 213, 230 (1891), Justice Brewer said: "So while the mailing of a letter creates an inference, raises a presumption that the party to whom it was addressed received it in due course of mail, and thus acquired knowledge of the matters stated therein, yet such presumption is one of fact, not of law. It is not conclusive, but subject to control and limitation by other facts."

See also *Crude Oil Corp.* v. *Comm'r of Internal Revenue*, 161 F. 2d 809, 810 (10th Cir. 1947); *Central Paper Co.* v. *Comm'r of Internal Revenue*, 199 F. 2d 902, 904-905 (1952); *Arkansas Motor Coaches* v. *Comm'r of Internal Revenue*, 198 F. 2d 189, 191 (1952).

This is a criminal case. The burden is upon the Government to prove that the card was actually not mailed. There is no presumption of legality in administrative proceedings where there is a prosecution in a criminal case based upon such administrative proceedings. The reason is that the presumption of innocence rebuts and repels the presumption of regularity in administrative proceedings.

In *Jones on Evidence in Civil Cases*, Fourth Edition, Bancroft-Whitney Co., San Francisco, 1938, Vol. 1, § 101, it is said: "Generally speaking, no legal presumption is so highly favored as that of innocence; ordinarily substantially all other presumptions yield to it in case of conflict." There the author cites *Dunlop* v. *United States*, 165 U. S. 486 (1897), and *Edwards* v. *United States*, 7 F 2d 357. It is later stated in this section, fourth paragraph, that the presumption of innocence prevails over a large number of other presumptions.

Notwithstanding *Koch* v. *United States*, 150 F. 2d 762, 763 (4th Cir. 1945), and *United States* v. *Fratrick*, 140 F. 2d 5, 7 (7th Cir. 1944), to the contrary, petitioner says that

the presumption of innocence in criminal proceedings makes inapplicable such presumption of regularity.

It is respectfully submitted that the trial court committed reversible error in refusing to instruct the jury as specifically requested in petitioner's Requested Instructions Nos. 45 and 46.

CONCLUSION

It is submitted therefore, that the judgment of the court below, affirming the judgment of conviction of petitioner in the United States District Court for the Southern District of California, Southern Division, should be reversed and a mandate should issue commanding the District Court to render and enter a judgment of acquittal; or, in the alternative, the case should be remanded to the District Court for a new trial because of the errors of the District Court in refusing the two vital instructions Nos. 45 and 46.

Respectfully,

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No. 75

In the Supreme Court of the United States

OCTOBER TERM, 1961

CARLIN CONSTANTINE VENUS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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HERBERT J. MILLER, JR.,
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32 C.F.R. 1642.2 36
32 C.F.R. 1642.3 36
32 C.F.R. 1642.41 (a) and (b) 36

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 75

CARLIN CONSTANTINE VENUS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions in the court of appeals (R. 246–259) are reported at 287 F. 2d 304.

JURISDICTION

The judgment of the court of appeals was entered on December 24, 1960 (R. 259–260), and a petition for rehearing was denied on February 2, 1961 (R. 260). On February 23, 1961, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to April 3, 1961 (R. 261). The petition was filed on April 1, 1961, and granted on May 15, 1961 (R. 261; 366 U.S. 922). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly affirmed petitioner's conviction of having knowingly failed to keep his local draft board advised of an address where mail could reach him in February 1955.[1]

STATUTE AND REGULATION INVOLVED

Section 12(a) of the Universal Military Training and Service Act, 50 U.S.C. App. 462(a), provides in pertinent part:

> Any * * * person charged as herein provided with the duty of carrying out any of the provisions of this title * * * or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

Selective Service Regulation 1641.3, 32 C.F.R. 1641.3, provides:

> *Communication by mail.* It shall be the duty of each registrant to keep his local board advised at all times of the address where mail will reach him. The mailing of any order, notice, or blank form by the local board to a

[1] Petitioner neither tenders as a question presented (see Pet. Br. 2) nor argues (Pet. Br. 13–38), as he did in his petition for a writ of certiorari (Pet. 18–20), that he was denied a speedy trial. Since petitioner has abandoned this claim, we do not deal with it in this brief. Cf. *Ladner* v. *United States*, 358 U.S. 169, 172–173.

registrant at the address last reported by him to the local board shall constitute notice to him of the contents of the communication, whether he actually receives it or not.

STATEMENT

On August 8, 1957, an indictment was returned in the United States District Court for the Southern District of California charging that petitioner knowingly failed to report for induction into the armed forces of the United States on November 8, 1955 (R. 1–2). Petitioner was convicted by a jury on this charge but his conviction was reversed on appeal because of inadequate and improper instructions. *Venus* v. *United States*, 266 F. 2d 386 (C.A. 9).[2]

On December 23, 1959, a two-count indictment was returned in the same district court charging that petitioner knowingly failed to perform a continuing duty to report for induction on or about April 9, 1956 (count one), and that he knowingly failed on or about February 1, 1955, to keep his local draft board advised of the address where mail would reach him (count two) (R. 2–4). On May 14, 1960, after a jury trial on both indictments, petitioner was convicted on count two of the second indictment (R. 200–201).[3] He was sentenced to three years' imprisonment and to pay a $500 fine (R. 40, 207).

[2] Petitioner was thereafter tried again on this indictment in August 1959, and December 1959 (see R. 98–99), but a mistrial resulted on each occasion because the jury was unable to agree upon a verdict (R. 247).

[3] The jury was unable to agree on a verdict as to the other charges (the first indictment, and count one of the second indictment), and these charges were dismissed by the trial court (R. 204).

I. THE EVIDENCE [4]

A. BACKGROUND

Petitioner registered for the draft on September 15, 1948, and in July 1950 he was classified 1–A by his Local Draft Board No. 140, San Diego, California (R. 124; *Cover Sheet* at R. 211, 213, 215; *Notice of Classification* at R. 228).[5] That same year, he married and received a dependency deferment (draft classification 3–A) (R. 124, 134–135; *Cover Sheet,* at R. 211, 213, 214; *Classification Questionnaire,* at R. 224, line 3). In November 1951, he was reclassified 1–A following his divorce (R. 125; *Classification Questionnaire* at R. 224, line 5). Shortly thereafter, petitioner filed a "Conscientious Objector Form" (R. 125), and, on January 9, 1952, he was classified 1–A–O—*i.e.,* available for noncombatant military service (*Cover Sheet* at R. 211, 213, 215; *Classification Questionnaire* at R. 224, line 10). Following this, he obtained employment with several shipbuilding concerns and, as a result, received an occupational deferment (2–A) on February 27, 1952, which was renewed on October 15, 1952 (R. 126; *Classification Questionnaire* at R. 224, lines 15 and 20). In January 1953, he was reclassified 1–A which classification was affirmed by the appeal board in April 1954

[4] Many of the exhibits introduced at the trial (primarily petitioner's selective service file) have been printed as part of the record and are referred to herein by their descriptive title followed by a record page number.

[5] Apparently petitioner could not be located at the address to which this Notice of Classification was sent (R. 227; see R. 124), but on August 8, 1950, petitioner reported his new address (see *Cover Sheet*, R. 211, 213, 215; line 1).

(*Classification Questionnaire* at R. 224, line 23). He was ordered to report for induction in May 1954. He reported as ordered but refused to submit to induction (R. 126–127; *Individual Appeal Record* at R. 229; *Order to Report for Induction* at R. 230–231). In August 1954, the local board reported petitioner's failure to submit to induction to the United States Attorney and, on October 20, 1954, he was indicted for this offense. In July 1955, following this Court's decision in *Gonzales* v. *United States*, 348 U.S. 407, the indictment was dismissed. On September 1, 1955, petitioner's 1–A classification was continued by the board (R. 62; *Classification Questionnaire* at R. 225, line 14).

B. THE FACTS OF THE OFFENSE

1. From August 1950 up until June 1954, petitioner notified his local draft board on five separate occasions of addresses where mail would reach him—three of which were in San Diego.[6] Petitioner testified at the trial that he "always knew" that he had to keep his local board informed of his address (R. 100, 133), and the Classification Questionnaire which he filed in May 1949 contained an instruction that he

[6] In his Classification Questionnaire filed on May 16, 1949, petitioner had listed his address in Chula Vista, California (see R. 103, 124, 217). On August 8, 1950, he reported a change of address to National City, California. The first of his San Diego addresses was given the local board in September 1951, and was his "personal address" where he resided with his first wife (R. 128). The other two addresses given prior to June 1954 were the residences of his parents in San Diego (R. 128–129; *Cover Sheet* at R. 211, 213, 215).

report to his draft board any change of address "at once" (*Instruction No. 5* at R. 217).

On June 7, 1954, petitioner wrote the following registered letter (R. 132) to his local board (R. 67):

> At this time I wish to inform you of my departure from San Diego to Modesto, California, because of secular employment. The Federal Bureau of Investigation I have notified when in Los Angeles after induction procedures. My new address is (Same employer) 1431 Tenth Street, Modesto, California, but can be reached within one or two days, at my San Diego address.

The return address on the envelope was "650 Eleventh Street, San Diego", which was then the address of petitioner's parents (R. 67–68, 129), and the most recent previous address given by him to the local board (see *Cover Sheet* at R. 211, 213, 215, line 5). At that time, the clerk of the local board made a notation in the file indicating to her that if any mail were returned to the board from the Modesto address she "would look for or try and contact [petitioner] through his San Diego address"; she knew that he had always given his parents as the persons through whom he could be reached (R. 67–68). However, in the course of time, in keeping up the file, the clerk omitted the notation referring to this San Diego address (R. 66).

2. In the early part of February 1955, petitioner moved from Modesto to Los Angeles (R. 106, 121–122, 130, 140–144). He left no forwarding address with the post office in Modesto (R. 101, 112, 130–131). He explained his failure to leave a forwarding ad-

dress on the ground that everybody knew the San Diego address of his parents and he knew that his local board had that address (650 Eleventh Street) (R. 130–131; see also R. 112).[7]

On the weekend of February 19–20, petitioner came down from Los Angeles to help his parents move from 11th Street to 30th Street in San Diego (R. 109, 122, 144, 155–156). He testified that, a few days thereafter, on his return to Los Angeles, he addressed and mailed a post card to his local board giving notice that he was no longer living in Modesto and that mail could reach him at the 30th Street address of his parents (R. 106–110, 112, 122, 131–132). He further stated that he put his parents' new address on the post card (R. 109). Edwin Beil, a witness for petitioner, testified that he was with petitioner in a Los Angeles Post Office a few days after petitioner's return from San Diego in February 1955 and saw him mail a post card. Mr. Beil was unable to read the writing on the card. He said that petitioner told him that it was a change-of-address notification (R. 145–146).

Mrs. Helen A. Haisch, a clerk at petitioner's local board, who had "complete charge of all the files" and whose responsibility it was "to open and stamp all of the incoming mail" (R. 49), stated that no such change of address notification was received from

[7] However, in January 1955, shortly before he left Modesto, petitioner had the State Director of Selective Service mail a photostatic copy of his draft board file to a friend's address in Modesto who then forwarded it to his parents' home in San Diego (R. 135–137).

petitioner and that, as a matter of fact, petitioner did not correspond with the board from June 1954 through the end of 1955 (R. 54–55). Mrs. Haisch testified that, pursuant to a suggestion from the United States Attorney's office, she and another clerk at the local board searched through all the files (some 2,000) of those registrants born in 1929 and 1930 (R. 90)—in an effort to see if the post card had been misfiled. (Petitioner was born in December 1929. (*Classification Questionnaire* at R. 217)). In addition, they searched through 1,000 other files according to draft classification (R. 90). No post card from petitioner was located in the search. Mrs. Haisch further testified that, although petitioner's original file was at the California State Selective Service Headquarters from November 1954 until July 1955, a "duplicate" or "dummy" cover sheet was made for petitioner and placed where the original file would ordinarily be, and this would contain all correspondence to or from petitioner while his regular file was out of the office (R. 77–79, 82–83; cf. 32 C.F.R. 1621.8).

3. From the latter part of February 1955 through December 1955, petitioner testified, he resided at some five separate locations. From February through the middle of April 1955, he lived in Los Angeles; he then moved to Venice, California, for a month; he then returned to Los Angeles and stayed at the Del Mar Hotel for about a week; he then resided for a month at 513 Grand Street; and during the last half of 1955 he resided at 2006 Stawns Drive, Los Angeles (R. 132–133). He did not inform

the local board of any of these addresses (R. 132–138; see also R. 111). Petitioner's first undisputed communication to his local board, after his June 1954 letter (*supra*, p. 6), came in early April 1956 when he advised the board of a "new address" at 756 Pier Avenue, Santa Monica, California (R. 95–96, 116).[5]

4. In September 1955, the local board sent a 1–A classification to petitioner at the Modesto address he had given the board in his June 1954 letter, and on October 28, 1955, the board sent a notice to this address ordering petitioner to report for induction on November 8, 1955 (R. 52–59). Both of these notices contained the return address of the local board. Neither one was ever returned to the board (R. 59). Mrs. Haisch explained that the Board did not attempt to locate petitioner at any other address after his failure to report for induction on November 8, 1955, because the order to report "was not returned to us. Therefore we assumed [petitioner] received it, so we did not contact anyone else or try to contact anyone else" (R. 73, see also R. 67, 69, 74).

Petitioner testified that he received neither notice (R. 110–111); and that the first time he was aware of the induction order was in April 1956, following his interview with an F.B.I. agent (R. 112, 113, 116). It was after this interview that he contacted the draft board, for the first time since June 1954, and advised them of his then current address (see *supra*).

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[5] This communication came shortly after petitioner's interview with an F.B.I. agent concerning his failure to report for induction in November 1955 (R. 113, 116).

II. THE INSTRUCTIONS OF THE TRIAL COURT

After charging the jury, *inter alia,* on the presumption of innocence (R. 170), and the burden on the government to prove guilt beyond a reasonable doubt (R. 171), the court continued (R. 176):

> You are instructed that a Registrant is not required to remain in one place or to notify the Local Board of every address even if the address is temporary. The Regulation is satisfied when the Registrant, in good faith, provides an address by which mail sent to that address furnished to the Board may be by the Registrant reasonably expected to come into his hands in time for compliance.

The court thereafter instructed that the question of petitioner's guilt or innocence on count two of the second indictment basically depended on whether, as petitioner claimed, he mailed a change of address notice to the local board in February 1955. If the jury believed, the court said, "that the defendant deposited in the United States Mail in Los Angeles in February, 1955 a card notifying the Local Board of the change of address, then whether or not the card was received by the Local Board, the defendant should be acquitted * * *" (R. 184, see also R. 185, 188–189, 190).

Defense counsel, although recognizing that this instruction was "perfectly proper" (R. 194), asked the court further to instruct the jury that they might acquit the defendant even if they found that he did not mail the post card, on the theory that the June 7, 1954 letter (see *supra,* p. 6), may be "construed by

the Jury as constituting notice of an address where [petitioner] could at all times be reached by mail" (R. 194). In accordance with this request, the court gave this additional instruction (R. 199):

> Defense Counsel have called my attention to the fact that it is one of their contentions that there was a previous letter in the file in which the defendant had stated something about where mail would reach him. It is, therefore, their contention that whether or not he mailed the letter of February 1, 1955, on their theory of the case, there was a place where mail would reach him and he therefore had complied. I call that to your attention because I had overlooked that contention of the defendant in summarizing the issues on that count.

As the court explained to defense counsel immediately thereafter, in the presence of the jury: "If the Jury find that the defendant had at all times kept the Board advised where mail would reach him, then of course he is to be acquitted" (R. 200). Defense counsel found these instructions "satisfactory" (R. 200).

On the question of knowledge and intent, the court instructed, in pertinent part, as follows (R. 186–187):[9]

> In the defendant's case, * * * if you find that he failed to do something he should have done but you find that it was done by mistake or inadvertence or some good excuse, certainly he shouldn't be convicted * * *. On the other hand, if you find that he did something knowingly

[9] The instructions on intent were meant to apply generally to each of the three charges on which petitioner had been tried.

> and with intent to disobey or to disregard the law, then you have a different situation entirely. Your decision may be the reverse.

And again (R. 187–188):

> You will note that the omission or failure to act as charged in the indictment is alleg d to have been "knowingly" done. The purpose of adding the word "knowingly" was to insure that no one would be convicted because of a failure to act due to mistake or inadvertence or other innocent reason.

SUMMARY OF ARGUMENT

A. Before turning to an examination of the sufficiency of the evidence and the propriety of the instructions in this case—the only challenges raised by petitioner to his conviction for having knowingly failed, in February 1955, to advise his local draft board of an address where mail could reach him [10]—we believe it will be useful to examine the significance of this address-notification duty in the overall operation and effectiveness of the Universal Military Training Program.

The success of a military training program depends in large measure upon the speed with which its administrative machinery can be activated to meet the manpower needs of war or national emergency. See *Falbo* v. *United States*, 320 U.S. 549, 551–552. Such success, however, cannot be achieved solely through the efforts of a pool of experienced personnel, no mat-

[10] As we have pointed out (*supra*, p. 2, fn. 1), petitioner does not, at this stage of the case, urge that he was denied a speedy trial.

ter how dedicated; it requires, at least in equal measure, the cooperation of each draft registrant. Unless the registrant keeps his local board advised at all times of an address where mail can promptly reach him, the Selective Service System would be thwarted at the critical moment which gave rise to the need for extraordinary and speedy measures.

The crucial importance of the address-notification requirement is emphasized in the Selective Service Regulations and Forms, which repeatedly remind the registrant of his duty to keep the local board advised of his current address. See, for example, 32 C.F.R. 1613.12(a) and (b) (1961 supp.), and Instruction No. 5, *Selective Service System Classification Questionnaire at* R. 217. Beyond these particularized duties, Section 1641.3 of the regulations imposes a continuing obligation on the registrant to "keep his local board advised at all times of the address where mail will reach him", and Section 12(a) of the Act makes a knowing failure "to perform such duty" a criminal offense (see *supra,* pp. 2–3). It is this fundamental duty which it is alleged that petitioner knowingly violated. As we now show, he was convicted of this charge upon sufficient evidence and under proper instructions.

B. The challenge to the sufficiency of the evidence in this case relates primarily to factual matters within the province of the jury which were resolved by the jury against petitioner. The jury's verdict has the support of both courts below. Petitioner submits no sound basis for overturning these findings. Cf. *De-*

laney v. *United States*, 263 U.S. 586, 589–590; *United States* v. *Johnson*, 319 U.S. 503, 518.

1. The evidence reveals two distinct patterns of behavior on petitioner's part with respect to his address-notification duty. The first (before the period charged in the indictment) is characterized by scrupulous compliance with the obligation. Starting in August, 1950,[11] petitioner conscientiously advised his local board of some five changes of address—three of which were in San Diego. Moreover, these San Diego addresses included his personal as well as his parents' residences. The second pattern (after he notified his board in June 1954 of his move from San Diego to Modesto, California)—during the period in which he no longer hoped to be exempted from service—was marked by a complete reversal in form. Commencing with his departure from Modesto in February 1955, and up until April 1956, petitioner failed to notify his board of any address where mail could reach him and he took no alternative measures to provide for the receipt of draft board mail sent to Modesto.[12] From all the evidence the jury had sufficient grounds to find that, when petitioner left Modesto in February 1955, he knowingly failed in his duty to make provision for the receipt of draft board mail which thereafter might be sent to him in that city.

[11] Petitioner had registered for the draft in 1948.

[12] After he left Modesto and during the remainder of 1955, petitioner resided at five different addresses.

2. Petitioner makes a three-pronged attack on the sufficiency of the evidence. None of his claims affects the validity of his conviction.

a. His contention that he did notify the draft board by post card of his parents' new address late in February 1955, following his departure from Modesto, was a factual assertion which the jury could and did disbelieve (see the Statement, *supra,* pp. 7–8).

b. Nor is there merit to petitioner's claim that, regardless of whether or not he sent the change of address notification in February 1955, he could have expected mail to reach him at his parents' San Diego address in view of the statement in his June 7, 1954 letter that he could be reached "within one or two days" at that address. The tenor of the June 7 letter (see *supra,* p. 6) reveals that petitioner designated his parents' San Diego address as a subsidiary address to which he expected draft board mail to be sent only if the board could not contact him in Modesto.

Essentially, petitioner's argument comes down to the claim that a registrant can, with impunity, simultaneously furnish various addresses to his board and thereafter change his mailing address at will without notifying the board or leaving forwarding directions, and then complacently wait until the board has exhausted every possible source that might disclose his whereabouts. But such random compliance with the Selective Service Regulations would be to place a premium on planned non-cooperation, which, as we have

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indicated, would in war or national emergency critically hinder rapid mobilization (see *supra,* pp. 12–13).

In any event, the evidence refutes petitioner's contention that he could have reasonably expected, in February 1955, that draft board mail would be sent to his parents' former San Diego address, and by that route come into his possession in time for compliance.

First, the jury could have rationally inferred that, in mailing the June 7, 1954 letter to the board—well knowing that his parents' San Diego address was on file as his last previous mailing address—petitioner himself recognized that the San Diego address no longer sufficed to meet his known duty to keep his local board advised at all times of an address where mail could reach him. Secondly, although the jury rejected petitioner's factual defense that he mailed a change of address notification to his board in February 1955, they could accept the implicit postulate in that testimony—that petitioner himself fully recognized and understood that when he left Modesto in February 1955, he was required, in some reasonable fashion, to comply with the address-notification requirements of the regulations. Considering this evidence together with petitioner's past history of strict compliance with the notice requirements, the jury could conclude that, when petitioner left Modesto in February 1955, he knew he had a duty to inform the board of a new address, or make other reasonable provision that mail thereafter sent to Modesto would reach him promptly, and that he did not take any action to this end.

We recognize that a "knowing" violation of the notice requirements is essential to support a conviction and that not every address, however temporary, must be given the draft board. See *Bartchy* v. *United States,* 319 U.S. 484, 488; *Ward* v. *United States,* 344 U.S. 924. To sustain a conviction, the evidence must establish that the registrant failed in bad faith to take precautions (either by advising the board of his current address, or by making provision for a chain of forwarding addresses) so that "mail, sent to the address which is furnished the board, may be by the registrant reasonably expected to come into his hands in time for compliance". *Bartchy* v. *United States, supra,* 319 U.S. at 489. The evidence in this case meets these standards.

c. Finally, there is no merit to petitioner's assertion that his conviction must fall because the government failed to prove that, if orders of the board had been sent to Modesto in February 1955 (instead of September and October 1955), petitioner would not have received them in time for compliance. Petitioner has misconstrued the offense on which he was convicted. The obligation to keep the draft board informed of an address through which the registrant can be reached is an important duty, independent of the obligation to report for induction. Failure to comply with that duty in February 1955 is not immunized from punishment because the board's actual directives to petitioner were mailed during a later time period.

C. The instructions of the trial court were wholly proper.

1. Proof of a "knowing" violation of the notice requirements is essential to the validity of a conviction under Section 12(a), and this question must be resolved by the jury under proper instructions. The trial court properly complied with this requirement; it admonished the jury that only a "knowing" violation constituted criminal conduct (see *supra*, pp. 11–12).

2. There is no merit to petitioner's claim that the trial court committed reversible error in refusing to give his requested instructions Numbers 45 and 46.

a. These requests to charge, in essence, asked the court to direct the jury that, unless the government showed by clear evidence that the change-of-address post card allegedly mailed in February 1955 was not received by the board, then it had to acquit petitioner (R. 17–18).

Under the court's instructions the sole issue for the jury was whether petitioner had *mailed* the card. If it was mailed, then the jury was required to find that petitioner had complied with the notification requirements (see *supra*, p. 10). The trial court's instructions were thus more beneficial than petitioner requested.

b. Petitioner has apparently confused the court's instructions on the notice issue with those of the court on the other charges on which he was simultaneously tried (failure to report for induction on November 8, 1955 and April 9, 1956), but on which

the jury reached no verdict. We do not understand how the instructions relating to the counts upon which the jury could not agree can now be subject to challenge, or how they affected the clear instructions given by the court on the count on which petitioner was convicted.

c. If petitioner is actually urging that the government was bound to prove *by direct evidence* that he did not mail the post card, he is seeking to impose an impossible burden of proof on the prosecution, as well as advocating the adoption of a unique rule in the trial of a criminal case. The government had no way of proving directly that petitioner did not mail the card. Only he or his witnesses could provide such information. See *United States* v. *Fleischman,* 339 U.S. 349, 360–362. The government adduced the only evidence it had at its disposal—that the post card was not received at the local board (see the Statement, *supra,* pp. 7–8). Its showing in this respect was certainly sufficient to shift the burden of going forward to petitioner to adduce testimony as to mailing, which he alone could provide. The jury, which was directed to assess this testimony, could and did reject it.

ARGUMENT

THE COURT OF APPEALS PROPERLY AFFIRMED PETITIONER'S CONVICTION FOR HAVING KNOWINGLY FAILED TO KEEP HIS DRAFT BOARD ADVISED OF AN ADDRESS WHERE MAIL COULD REACH HIM

Petitioner was convicted by the jury of having knowingly failed, in February 1955, to advise his local draft board of an address where mail could reach him,

in violation of Section 12 of the Universal Military Training and Service Act and Section 1641.3 of the Selective Service Regulations (*supra*, pp. 2–3). Before turning to the challenges to his conviction urged by petitioner [13]—the sufficiency of the evidence and the propriety of the instructions—we believe it will be useful to examine the significance of this address-notification duty in the overall operation of the Universal Military Training Program. This examination will demonstrate, we submit, the crucial nature of the duty and, correspondingly, will underscore the grave consequences that would flow from widespread disobedience.

A. A SUCCESSFUL MILITARY TRAINING PROGRAM DEPENDS LARGELY UPON COMPLIANCE BY THE DRAFT-REGISTRANT WITH HIS DUTY OF KEEPING HIS DRAFT BOARD ADVISED OF AN ADDRESS WHERE MAIL WILL REACH HIM

The success of a military training program depends upon how speedily and efficiently its administrative machinery can be triggered into operation to meet the manpower requirements of war or national emergency. As this Court observed in *Falbo* v. *United States*, 320 U.S. 549, 551–552, concerning the transfer of national manpower resources to war activities under the Selective Training and Service Act of 1940:

> When the Selective Training and Service Act was passed in September 1940, most of the world was at war. The preamble of the Act declared it "imperative to increase and train the personnel of the armed forces of the United

[13] As already noted (*supra*, p. 2, fn. 1), petitioner has abandoned at this stage of the case the claim that he was denied a speedy trial.

> States." The danger of attack by our present enemies, if not imminent, was real, as subsequent events have grimly demonstrated. The Congress was faced with the urgent necessity of integrating all the nation's people and forces for national defense. That dire consequences might flow from apathy and delay was well understood. Accordingly the Act was passed to mobilize national manpower with the speed which that necessity and understanding required.

The numerous procedures established by the Selective Service Regulations governing registration, classification, selection, and induction, were not meant to be self-executing. Not only does the effective operation of the draft mechanism require dedicated and effective personnel working at all levels on the enormous task of classifying, inspecting, selecting, and inducting a great heterogenous group of men, but it requires also the active cooperation of those members of the citizenry subject to the law. Just as the federal tax system cannot collect revenue without the active cooperation of the taxpayer (cf. *Spies* v. *United States,* 317 U.S. 492, 495), so the military training program must, in large part, rely for the achievement of its goal on the direct aid of the draft-registrant. In view of the immense proportions and complexity of the task of general mobilization, it is manifest that, if the local board were required to expend its energies and time in a trial and error process of locating registrants, the very inadequacy of the process would thwart the Selective Service System at the critical moment which gave

rise to the need for extraordinary and speedy measures. If there is to be "'a prompt and unhesitating obedience to orders' issued in [the draft] process* * *" (*Falbo* v. *United States, supra,* 320 U.S. at 554)—the *sina qua non* of effective national defense through a citizen army—the local board must be in a position to transmit to the registrant speedily those orders to which he owes "unhesitating obedience." The local board must therefore be able to contact the registrant promptly; and this means that it must be kept advised at all times by the registrant of an address where mail will reach him.

Recognizing the critical importance of this need for ready communication, the Selective Service Regulations and Forms make repeated reference to the address-notification responsibilities of the registrant. For example, at the very inception of the draft procedure (*i.e.,* registration), the regulations direct the registrar to "take extreme care" that the residence of the registrant is correctly entered on the "Registration Card" and to "advise the registrant that a correct mailing address is most important because it is the address to which all notices * * * will be sent, and that he must advise his local board each time there is a change in his mailing address" (32 C.F.R. 1613.12 (a) and (b) (1961 supp.)); the "Classification Questionnaire", which is mailed to the registrant following the registration procedures (32 C.F.R. 1621.8–1621.10), instructs that after it has been returned the registrant is to report to his local board "at once any change of address * * *" (see Instruction No. 5, *Selective Service System Classification*

Questionnaire at R. 217); the "Cover Sheet", prepared for each registrant before the mailing of the Questionnaire, which is kept at the local board as the file of all papers and documents pertinent to the registrant (see 32 C.F.R. 1621.8), provides spaces to indicate changes in address so as to reflect at all times his current address (see *Cover Sheet*, R. 211, 213, 215); and the "Notice of Classification" sent to the registrant (32 C.F.R. 1623.4–1623.5 (1961 supp.)) directs him to notify the local draft board of any change of address (see *Notice of Classification* at R. 228); and the registrant is directed to report to his local board "within 10 days" any change in his "home address" (32 C.F.R. 1641.7(a) (1961 Supp.). Beyond these particularized duties, Section 1641.3 of the regulations imposes a continuing obligation on the registrant to keep his local board advised at all times of the address where mail will reach him", and Section 12(a) of the Act makes a knowing failure "to perform such duty" a criminal offense (see *supra* pp. 2–3).[14]

In sum, the charge on which petitioner stands convicted does not derive from some highly technical, obtuse, or formalistic requirement. Rather, it stems from one of the core premises underlying successful mobilization through the Selective Service System. It rests on the valid assumption that, unless the registrant advises his local board of an address where mail will reach him in time for compliance with the board's directives, the selective service machinery cannot be utilized effectively for the speedy and efficient raising

[14] The Act itself (Section 15(b); 50 U.S.C. App. 465(b)) further directs the registrant to "keep his local board informed as to his current address * * *".

and maintenance of our armed forces. It is this basic duty which it is alleged that petitioner knowingly violated. As we now show, he was convicted of this charge upon sufficient evidence and under proper instructions.

B. THE JURY'S VERDICT WAS BASED ON SUFFICIENT EVIDENCE

The sufficiency of the evidence to support petitioner's conviction for having knowingly failed to keep his local board advised in February 1955 of an address where mail would reach him depends in large measure upon issues of credibility—an appraisal of petitioner's conduct and the inferences which might be properly drawn from such behavior, particularly on the issue of knowledge and intent. The issues in this case thus relate primarily to factual matters within the province of the jury, which were resolved by the jury against petitioner and which have the support of both courts below. Not only are these findings entitled to great weight (see, *e.g.*, *Glasser* v. *United States*, 315 U.S. 60, 80; *Delaney* v. *United States*, 263 U.S. 586, 589–590; *United States* v. *Johnson*, 319 U.S. 503, 518), but petitioner suggests no sound reason why this Court should overturn them.

1. In outline, the evidence shows that, on June 7, 1954, petitioner sent a registered letter to his local draft board advising it that he was moving from San Diego to Modesto, California; informing the board of his "new address" in that city; and concluding with the comment that he could be reached "within one or two days" at the San Diego address

that he had last previously given his board.[15] The evidence further shows that his notification of his move to Modesto in June 1954 was in conformity with his past dealings with the board. Petitioner, who had registered for the draft in 1948, had subsequently notified his local board of each change of address—some five changes.[16] Nor had he, during this period, simply advised his local board of his parents' addresses. On the contrary, the first San Diego address he gave the board (in September 1951) was his "personal address" in that city (R. 128). Thereafter, and up until the June 1954 letter, he had advised the board on three later occasions of changes in his mailing address in San Diego (see *Cover Sheet*, R. 211, 213, 215, lines 3–5). As Mrs. Haisch (the draft board clerk) stated, petitioner had been "prompt and careful" about sending the board notification of changes in address (R. 77).

The evidence reveals a sudden reversal in this pattern of scrupulous compliance, commencing in February 1955. On February 7, petitioner left Modesto for Los Angeles but, at that time, he gave the local board no notice; nor did he leave a forwarding address with the Modesto post office. Some two weeks later, petitioner returned to San Diego for a few days (February 19–20), to assist his parents in moving from 11th Street to 30th Street in San Diego. The jury could find that, on his return to Los Angeles,

[15] This was the then address of his parents, 650 Eleventh Street.

[16] The one apparent exception was in July 1950, which petitioner rectified some two months later (see *supra*, p. 4 n. 5).

he failed to advise his board of his parents' new address as the location where mail would reach him (see *infra*, pp. 27–28). There is certainly no question that he failed to advise the Post Office Department of his parents' new address.

The evidence, in sum, discloses two totally dissimilar patterns of action by petitioner. The first—scrupulous notification as to changes of address—occurred during a period when petitioner was attempting to get his 1–A draft classification changed (see the Statement, *supra*, p. 4).[17] The second—complete disregard of the address-notification duties—took place after administrative review of his 1–A classification had finally terminated.[18] From all of this evidence the jury had a proper basis for finding that, when petitioner left Modesto in February 1955, he knowingly failed in his duty to make provision for the receipt of draft board mail sent to him in that city.

2. Petitioner makes three challenges to the sufficiency of the evidence. He says: (a) that he did notify his local board of his parents' new address late in February 1955, following his departure from Modesto; (b) that, in light of the contents of the June 7, 1954 letter in which he mentioned his parents' old

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[17] In fact, two of the addresses which petitioner sent the board before June 1954 had been sent during the prior six months while petitioner was prosecuting an appeal from his January 1953 classification in 1–A (R. 126–127; *Cover Sheet*, R. 211, 213, 215, lines 4 and 5).

[18] It should also be noted that, although petitioner had some five different residences during the remainder of 1955, he admittedly did not notify his board of any of them (R. 132–133).

San Diego address, he could reasonably expect that draft board mail would reach him by way of that address; and (c) that, in any event, his conviction must fall since no draft board notices were sent to him in February 1955, the only period of time covered in the indictment (Pet. Br. 20–33). None of these claims affects the validity of the conviction.

a. Petitioner testified that he had mailed a change-of-address post card in February 1955, following his parents' move to a new address in San Diego, and that he informed the Board on this card that this was the address to which his mail should thereafter be sent (R. 109–110; see also R. 145–146). Mrs. Haisch, who was in "complete charge" of all the files at petitioner's local board and who had the duty "to open and stamp all of the incoming mail" (R. 49), testified that no post card from petitioner was received in February 1955 and that, in fact, no correspondence was received by the draft board from petitioner during the entire year of 1955. She testified further that, even though petitioner's file was out of the draft board office during this period of time, any mail received from petitioner would have been placed in a "dummy" file; and that, in an effort to discover if the card had been misfiled, she and another clerk made a thorough search through some 3,000 draft files in the office of the board but failed to turn up petitioner's card (see the Statement, *supra,* p. 8). Moreover, although petitioner claimed he had placed a return address on the post card, he did not assert that it had been returned to him. The jury also had evidence that petitioner took no alternative action in February 1955 to see to it that he would

come into possession of draft board mail sent to his address in Modesto in time for compliance. It is undisputed that he did not [redacted] notify the post office in Modesto of any forwarding address. Nor does the record indicate any effort on his part to check at the Modesto address for mail, or to make any other serious provision that mail sent to Modesto would be promptly forwarded to him (R. 130).[19]

The short of it is that the jury who saw the witnesses and heard the evidence could disbelieve petitioner's version of events and conclude instead that he mailed no postcard and made no other arrangement in February 1955 to have draft board mail sent to Modesto come into his possession in time for compliance. Cf. *United States* v. *Groopman,* 147 F. 2d 782, 784–785 (C.A. 2), certiorari denied, 326 U.S. 745; *Word* v. *United States,* 199 F. 2d 625, 626–627 (C.A. 10), certiorari denied, 345 U.S. 936.

b. There is no merit in petitioner's further claim—that, since his letter of June 7, 1954 also contained the concluding statement that he could be reached "within one or two days" at his parents' San Diego address at that time (650 Eleventh Street), he could have expected mail to reach him by way of that address even after he left Modesto in February 1955, and therefore he should not have been convicted of having know-

[19] Petitioner claimed that when he left Modesto he requested Mr. Morrison, his employer in that city, to forward mail sent to Modesto to his parents' address at 650 Eleventh Street in San Diego (R. 131). But petitioner did not offer the testimony of Mr. Morrison on this issue and the jury could disbelieve the claim.

ingly violated the address-notification requirements of the Selective Service Regulations (Pet. Br. 22–24, 27–28).

In this connection, petitioner (Pet. Br. 24–25) relies upon the testimony of the draft board clerk (Mrs. Haisch) to the effect that, even after the receipt of the June 7, 1954, letter she knew that petitioner could be reached at his parents' San Diego address, and that she had noted this fact in the file (R. 67–68). But an examination of the contents of the June 7, 1954 letter (*supra*, p. 6), reveals that petitioner did not advise the board, as he could easily have done, that he intended the Modesto and San Diego addresses to be considered as alternative permanent addresses, or that the Modesto residence was only temporary and that the board should continue to send all of his mail to his parents' San Diego address. On the contrary, the June 7 letter reveals plainly that petitioner designated Modesto as his principal and permanent "new address". The clear implication to be drawn from his correspondence is that he wanted all draft board mail sent there in the first instance. To the extent that the letter also referred to his parents' San Diego address, this was apparently meant to provide a subsidiary or secondary mailing address to the board—an address where mail could reach petitioner *if* he could *not* be located at his Modesto address. Mrs. Haisch so understood the letter and, as she said, the notation was to serve as a reminder "that if any mail were returned to us from the Modesto address * * * I would look for or try and contact [petitioner] through his San Diego address" (R. 67).

Considered against this factual background, petitioner's argument seems to amount to the following: Even though petitioner moved in February from the address (in Modesto) which he had given the board (without notifying the board of that fact or providing a chain of forwarding addresses) and even though his parents moved in February from the San Diego address which petitioner had given earlier (without—as the jury found—petitioner's giving any notice of that fact), petitioner could reasonably expect the board to trace the new address of his parents and through them his new location.[20] Under this reasoning, a registrant could, with impunity, simultaneously furnish various addresses (permanent as well as transitory) to his local board, and thereafter change his mailing address at will without notifying the board or leaving forwarding directions, and then complacently wait until the board has exhausted every possible source that might disclose his whereabouts. But, as we have already suggested, to view such desultory or random compliance as enough to satisfy the address-notification requirements of the regulations would be to place a premium on planned non-cooperation, which in war or national emergency could critically hinder the rapid mobilization of manpower.

We do not say that a draft registrant is subject to criminal sanctions because he does not proceed, in petitioner's language, "as if he were a lawyer before the draft board" (Pet. Br. 26). We do say, however,

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[20] Petitioner moved extensively in 1955, having some five residences in the Los Angeles area (see the Statement, *supra*, pp. 8–9).

that he is subject to the rigors of prosecution and conviction where he *knowingly* fails to comply with one of the central duties imposed upon him by the Selective Service Regulations—*i.e.*, advising his board of a particular address where mail can reach him. When he knows that he has failed to keep the board abreast of his new location, he cannot excuse himself by insisting that the board could have traced him through some earlier address previously given on another occasion.

In any event, the evidence refutes petitioner's contention that he could have reasonably expected, in February 1955, that draft board mail would be sent to his parents' former San Diego address, and by that route come into his possession in time for compliance. In the first place, if, as petitioner claims, he truly intended to retain his parents' San Diego address as his mailing address when he moved to Modesto, it is difficult to understand why he sent the letter of June 7, 1954, at all. His parents' address was already on file at the board, being the last previous address he had provided. Nevertheless, he sent a registered letter informing the board of his "departure" from San Diego and of his "new address" in Modesto. We submit that the jury could consider this action as a purposeful and knowing transmittal by petitioner to the board of a new mailing address, consistent with his past conduct of regularly transmitting changes of address whenever his mailing address changed (see *supra*, p. 25). Indeed, the jury could have rationally inferred that in mailing this letter petitioner himself recognized that

his previous San Diego address no longer sufficed to fulfill his known duty to keep his local board advised at all times of an address where mail could reach him. From the tenor of the letter and in consideration of petitioner's past conduct, it is a fair inference that he considered his move to Modesto in June 1954 a significant change in residence and domicile. As he himself testified, he received about one letter "every other week" while living in Modesto (R. 130). Consequently, the jury could further find that, when petitioner left Modesto in February 1955, he knew he was required to take some action to insure that he would receive mail which might thereafter be sent to this former address.

This conclusion gains added strength from petitioner's own testimony at the trial. According to petitioner, after he left Modesto in February 1955, and following his parents' relocation on Thirtieth Street in San Diego, he notified his local board by post card that mail could reach him at his parents' new address (see *supra,* pp. 7, 27). He testified that he informed the board in the post card that his "new home address" was the new address of his parents at 1120 30th Street, San Diego, and further told them he "was no longer at Modesto," and that all mail should be sent to this new address (R. 110). When asked by his counsel why he sent this notification to the board, petitioner explained that when he left Modesto he commenced "traveling from place to place" and he "knew that the Board had to have a permanent address" at which to contact him (R. 110).

As we have already pointed out, the jury, on ample evidence, resolved against petitioner the factual defense that he had mailed the card in February 1955 (see *supra*, pp. 27–28). In so doing, however, there was no reason for the jury to reject the underlying postulate of that testimony—that petitioner himself fully recognized and understood that when he left Modesto in February 1955 he was required, in some reasonable fashion, to comply with the address-notification requirements of the Selective Service Regulations. On the contrary, the jury could consider his testimony as an implicit admission that he had such a duty. And, apart from this testimony, the jury had evidence that petitioner had strictly complied with the notice requirements theretofore, even when a change of address occurred in the same city (San Diego). It also knew that when he took up residence in Modesto petitioner notified his local board of this fact. In considering these circumstances, the jury had ample reason to conclude that, when petitioner testified that he complied with the duty of notification in February 1955, such a duty did exist and petitioner was fully cognizant of it. As with any other witness, the jury had the right to accept or reject defendant's testimony, or any part of it, as it saw fit. *United States* v. *Groopman*, 147 F. 2d 782, 784, 785 (C.A. 2), certiorari denied, 326 U.S. 745; *Word* v. *United States*, 199 F. 2d 625, 626–627 (C.A. 10), certiorari denied, 345 U.S. 936; *United States* v. *Linenberg*, 179 F. Supp. 808, 812 (E.D. Pa.). It was authorized to reject petitioner's claim that he mailed the post card in February

1955, yet to accept the representation implicit in his testimony that he knew he had the duty in February 1955 to notify the board of a change in address.

We recognize that "[n]ot every failure to perform a duty imposed by the statute or regulations is made criminal; only a person 'who shall knowingly fail or neglect' his duty is to be punished." *United States* v. *Trypuc*, 136 F. 2d 900, 901 (C.A. 2). See, also, *Bartchy* v. *United States*, 319 U.S. 484, 488–489; *Ward* v. *United States*, 344 U.S. 924; *Caldwell* v. *United States*, 139 F. 2d 121, 124 (C.A. 5); *United States* v. *Hoffman*, 137 F. 2d 416, 419 (C.A. 2). Similarly, we recognize that a case of this sort is not proved simply because a draft registrant failed "to notify the local board of every move or every address * * *" (*Bartchy* v. *United States*, 319 U.S. 484, 488; *Caldwell* v. *United States*, 139 F. 2d 121, 124 (C.A. 5)). In order to support a conviction, the evidence must be sufficient to show that the registrant failed in bad faith to take precautions (either by providing the local board with his current address, or by some alternative act, as by making reasonable provision for a chain of forwarding addresses), so that "mail, sent to the address which is furnished the board, may be by the registrant reasonably expected to come into his hands in time for compliance." *Bartchy* v. *United States, supra*, 319 U.S. at 489.

It was under these standards that petitioner was convicted in this case. This Court in *Bartchy, supra*, framed the test in terms of what the registrant could reasonably be expected to do under the circumstances.

Cf. *United States* v. *Trypuc, supra; United States* v. *Haug,* 150 F. 2d 911 (C.A. 2). In the light of all the circumstances, the jury could properly find that petitioner could reasonably be expected to notify the draft board of a change of address when he left Modesto or, in the alternative, provide a chain of forwarding addresses, and that he knowingly failed to do either.

Nor is this case, as petitioner alleges (Pet. Br. 32–33), like *Ward* v. *United States,* 195 F. 2d 441 (C.A. 5), reversed *per curiam,* 344 U.S. 924. There, although a local draft board had notice from the return of its unopened communications sent to various addresses provided by the registrant that he was not at these addresses, it did not send any mail to the address of the registrant's employer, provided on the classification questionnaire, which the registrant claimed at the trial he relied upon as his mailing address. Here, as we have shown, the jury could find that the local board would not, in February 1955, have had reason to believe that Modesto was no longer petitioner's mailing address. In fact, subsequent events proved this to be so. When the time came for the board to get in touch with petitioner, even if it desired to undertake an extensive search for him (see R. 69, 74),[21] it had no reason to do so since

[21] If a draft board has notice that a registrant cannot be located through the address he has provided, failure to follow up other clues as to his whereabouts would not excuse the registrant's own violation or constitute a valid defense to prosecution. The regulations provide that "if the local board believes by reasonable effort it may be able to locate the registrant and

the mail sent to the last address he had given (Modesto) was never returned to the board. It thus had no way of knowing that petitioner had not received the notices sent in September and October 1955. As the clerk of the board (Mrs. Haisch) testified, since the order to report for induction sent out on October 28, 1955, "was not returned to us * * * we assumed [petitioner] received it [and] * * * did not contact anyone else or try to contact anyone else" (R. 73; see also R. 67, 69, 74).

c. There is likewise no merit to petitioner's related contention (Pet. Br. 23, 25–27) that his conviction cannot stand since the government failed to prove that if orders of the board had been sent to Modesto in February 1955 (instead of September and October 1955) petitioner would not have received those orders in time for compliance.[22]

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secure his compliance", it may attempt to locate him for a period not in excess of 30 days before reporting his delinquency to the United States Attorney. See 32 C.F.R. 1642.41 (a) and (b). And another regulation under part 1642 provides (32 C.F.R. 1642.3):

"*Compliance with procedures of this part not condition precedent to prosecution.* Compliance by a local board or any other agency of the Selective Service System with any or all of the procedures prescribed by the regulations in this part is not a condition precedent to the prosecution of any person under the provisions of section 12 of title I of the Universal Military Training and Service Act, as amended."

[22] As the Selective Service Regulations make clear (see 32 C.F.R. 1642.2), the duty which petitioner was convicted of violating was a continuing one. See *United States* v. *Guertler*, 147 F. 2d 796 (C.A. 2), certiorari denied, 325 U.S. 879). For some unexplained reason, however, the indictment limited the period of the offense to "on or about February 1, 1955" (R.

If petitioner means by this contention that the government did not prove that he failed to furnish his board with an address where mail would reach him during February 1955, then he is merely rearguing the factual issues already discussed, and which we have shown were properly resolved against him by the jury on sufficient evidence. If, on the other hand, he is contending that the offense does not occur unless, during the period charged, the registrant failed in timely fashion to respond to orders of the board, then he is wholly misconstruing the nature of the offense. The offense for which petitioner was convicted is not that he failed to report for induction on any particular date, but that he knowingly failed to provide the board with an address where mail would reach him in time to respond to such or any other orders of the board. And while it is true that, as a practical matter, this offense would usually come to the attention of the board only if the registrant failed to respond to the board's directives, it does not follow that the registrant's failure to comply with such directives must occur during the same period of time in which he failed to notify the board of a change of address. The obligation to keep the draft board informed of

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3–4). In the course of his instructions—in light of petitioner's claim that he had sent a change-of-address notice to the draft board in the latter part of February—the trial judge instructed that proof of the offense at any time during the month of February 1955 would support the charge in the indictment (see the Statement, *supra*, pp. 10–11).

Of course, as the court below held—and petitioner makes no such claim—there was no variance between the indictment date (on or about February 1, 1955) and the actual proof. The dates were, in fact, substantially the same (see R. 254, n. 5).

an address through which the registrant can be reached is an important independent duty (see *supra*, pp. 20–24).

As we have emphasized, the crucial question in this case is whether "mail, sent to the address which is furnished the board, may be by the registrant reasonably expected to come into his hands in time for compliance." *Bartchy* v. *United States*, *supra*. The jury was satisfied that, when petitioner left Modesto in February 1955, he did not reasonably expect that mail sent by the board to that address would come into his possession in time, and that he nevertheless knowingly failed to take any action to remedy that situation.

C. THE INSTRUCTIONS OF THE TRIAL COURT WERE PROPER

1. We have already adverted to the fact that proof of a "knowing" violation is essential to a finding of guilt in a case of this sort (see *supra*, pp. 30–31, 34). The existence of intent is, of course, a question for the jury. *United States* v. *Hoffman*, 137 F. 2d 416, (C.A. 2), cf. *United States* v. *Weiss*, 162 F. 2d 447 (C.A. 2), certiorari denied, 332 U.S. 767. It is therefore of crucial importance that this issue of knowledge be left to the jury under proper instructions. See *United States* v. *Trypuc*, 136 F. 2d 900 (C.A. 2) and *United States* v. *Haug*, 150 F. 2d 911 (C.A. 2), where the failure of the trial court properly to instruct on knowledge led to the reversal of the registrants' convictions.[23]

[23] In *Trypuc* the court of appeals reversed a conviction for knowingly failing to keep a draft board advised of an address,

There was no such defect in the court's instructions to the jury in this case. Early in its charge the court stated the test of knowledge in accord with the formulation in *Bartchy* v. *United States, supra,* 319 U.S. at 489. The court said (R. 176):

> You are * * * instructed that a Registrant is not required to remain in one place or to notify the Local Board of every address even if the address is temporary. The Regulation is satisfied when the Registrant, in good faith, provides an address by which mail sent to that address furnished to the Board may be by the Registrant reasonably expected to come into his hands in time for compliance.

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where the trial court had omitted to instruct the jury that they must find that the defendant "knowingly" failed to keep his board so advised. See *United States* v. *Guertler*, 147 F. 2d 796, 797 (C.A. 2), certiorari denied, 325 U.S. 879, in which the Second Circuit, in distinguishing its *Trypuc* decision, commented: "* * * the error we found there [in *Trypuc*] was the charge of the district judge to the effect that the failure of the defendant to notify the board of his correct address was a crime. We pointed out that the issue was not the correctness of the address, but 'whether the appellant "knowingly" failed to keep the Board advised of an address where the mail would reach him.'"

The *Haug* case involved a Norwegian sailor who gave as his address on his Registration Card the "Seamen's Church Institute" in New York where he lived at the time but from where he shipped out to sea, being absent most of the time during the periods relevant to the case. Haug's defense was that the Selective Service System notifications delivered to the Institute were sent under an erroneous name and would not have been delivered to him even had he called for his mail. The court of appeals held that the issue of whether, under such circumstances, Haug had kept his draft board advised depended on whether it was Haug's intent to call at the Institute for his mail from time to time and that the trial court had never instructed the jury on this issue.

The court further observed that in his dealings with his draft board the defendant "is not to be considered * * * as though he were engaged in litigation represented by a lawyer, but you must consider his actions in the same way as any other man his age, intelligence, background and experience" (R. 176). The judge later charged that only if the jury found that petitioner "did something knowingly and with intent to disobey or disregard the law" could he be convicted (R. 186–187), and that "[t]he purpose of adding the word 'knowingly' [to the indictment] was to insure that no one would be convicted because of a failure to act due to mistake or inadvertence or other innocent reason" (R. 187–188). The court's instructions, in short, repeatedly admonished the jury that only a "knowing" violation of the address-notification requirements constituted criminal conduct.

2. Petitioner challenges the court's instructions on the ground (Pet. Br. 34–38) that it was reversible error not to give his requested instructions Numbers 45 and 46. These points, too, are unsound.

a. Number 45 requested, in essence, that the jury be charged that it could not find that the change-of-address post card, allegedly sent by petitioner to the board in February 1955, was not received solely because it was not found in petitioner's draft board file, but that "it is upon the Government to show by clear and convincing evidence beyond a reasonable doubt that the card was not received * * * established by witnesses whose duty it was to process the incoming mail or who actually did handle and process the mail at the time in question." Number 46 requested that

the jury be told that there was a factual assumption that, if the card was mailed, it was received; that this presumption could not be overcome by the presumption that "the board employees performed their duty" in handling incoming mail; and that the government had to prove that "the card actually was not received by the board" (R. 17–18). Petitioner's challenge in this regard is wholly without merit. Not only were the instructions given by the court on the post card issue entirely proper, but, in fact, they were more beneficial to petitioner's cause than the instructions he actually sought.

The court instructed the jury with particularity that "if you find the defendant did mail that change of address as he testified he did, then your duty on that count is to acquit him" (R. 179). And again (R. 184):

> * * * if you find and believe that the defendant deposited in the United States Mail in Los Angeles in February, 1955 a card notifying the Local Board of the change of address, *then whether or not the card was received by the Local Board*, the defendant should be acquitted on count two in the second indictment [Emphasis added.] [See also R. 185, 188–189, 190].

Under the court's instructions, the jury was to resolve the issue of whether petitioner had complied with his duty of notification in February 1955, not in terms of whether the post card was *received* by the local board but in terms of whether the card was *mailed* by petitioner. If it was mailed, then the jury was required to find that petitioner had complied with the notifica-

tion requirements, regardless of any doctrine of administrative regularity in processing and filing incoming mail. Hence, there is no relevance to petitioner's argument that the court should have charged as he requested on the question of *receipt* (Br. 37), for that question was not involved at all under the court's theory of the case. The sole issue for the jury was whether petitioner had *mailed* the card.

In addition, the trial court stated generally that a properly addressed and mailed letter or card is presumed to have been received by the addressee in the due course of the mails, that before such a presumption arises there must "be clear proof of the mailing" and proof that the communication was "properly addressed", and that the presumption would not arise unless it were shown that the addressee "was at or in contact with the place to which the communication was mailed " (R. 175–176). In view of these instructions, the trial court was correct in rejecting petitioner's requests to charge "as not adding anything to the other instructions given * * *" (R. 162). See *Sugarman* v. *United States*, 249 U.S. 182, 185; *Shibley* v. *United States*, 237 F. 2d 327, 333 (C.A. 9), certiorari denied, 352 U.S. 873.

b. Petitioner has apparently confused the court's instructions on this question with its instructions on the other charges upon which he was also tried—*i.e.*, that he failed to report for induction on November 8, 1955 (the first indictment) and on or about April 9, 1956 (the first count of the second indictment) (R. 1–3). In its instructions on those counts there was reference to the nature of the proof that the induction

notices of September and October 1955 had been mailed by the local board. And it was to these counts that the court addressed itself when discussing the presumptions of receipt. But the jury did not reach a verdict on these charges, and we do not understand how such instructions can now be subject to challenge, or how they affected the clear instructions on the count on which petitioner was convicted.[24]

c. If petitioner means to argue that the government was required by *direct* evidence to show that "the card was actually not mailed" (Pet. Br. 37), he is seeking to impose an impossible burden of proof on the government and to engraft a novel rule in the trial of a criminal case. The government had no way of proving by direct evidence that petitioner did not mail the post card. This was information which only petitioner and his witnesses could provide. See *United States* v. *Fleischman*, 339 U.S. 349, 360–362; *Morrison* v. *California*, 291 U.S. 82, 88–91; *Rossi* v. *United States*, 289

[24] It might be noted that, in the instructions directed to the other counts, the court did not rely upon "the mere presumption that the board employees performed their duties", as petitioner says (Pet. Br. 36). The court said (R. 175–176): "* * * To establish mailing of a letter containing notice, in the absence of direct evidence, there must be proof of an invariable custom or usage in an office of depositing mail in a certain receptacle, that the letter in question was deposited in such receptacle, and in addition there must be testimony by the employee whose duty it was to deposit the mail in the Post Office that he or she actually deposited that letter in the Post Office or that it was the invariable custom to deposit every letter placed in the office receptacle in the United States Post Office or Mail Box."

Of course, as we have noted, the propriety of these instructions is not in issue here since the jury was unable to agree on a verdict as to the counts to which they were directed.

U.S. 89, 91; *Bell* v. *United States,* 185 F. 2d 302, 309 (C.A. 4), certiorari denied, 340 U.S. 930; *Dillon* v. *United States,* 218 F. 2d 97, 99–100 (C.A. 8), certiorari dismissed, 350 U.S. 906; *Williams* v. *United States,* 170 F. 2d 319, 322 (C.A. 5), certiorari denied, 335 U.S. 909. The only evidence the government had or could submit as part of its case was testimony that no such post card was received at the local board (see the Statement, *supra,* pp. 7–8). And while this evidence did not and could not exclude the possibility that the card had somehow gone astray through no fault of the accused, it certainly was sufficient to shift the burden of going forward to petitioner to adduce testimony as to mailing, which he alone could provide. It was this latter testimony which the jury was directed by the court to assess and evaluate. And it was this testimony that it could and did reject—thus finding that the post card was never mailed.

In sum, on sufficient evidence, under proper instructions, the jury found petitioner guilty as charged. The probative sufficiency of the evidence has the support of both the trial court and the court below, and there is no showing of error in this appraisal. In the circumstances, there is no reason to disturb the jury's findings. *Delaney* v. *United States,* 263 U.S. 586, 589–590; *United States* v. *Johnson,* 319 U.S. 503, 518.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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NOVEMBER 1961.

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Supreme Court of the United States

OCTOBER TERM, 1961

No. 75

CARLIN CONSTANTINE VENUS, Petitioner

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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MAY IT PLEASE THE COURT:

Petitioner will reply seriatim to the brief for the United States.

I.

At the bottom of page 7 and top of page 8 reference is made to the testimony of the clerk of the local board to the effect that no change of address card was received by the board, claimed by the petitioner to have been mailed in Los Angeles in February, 1955. The Court should bear in mind that the sole basis for this testimony was that the clerk,

who had absolutely no independent recollection of the matter, based her testimony solely upon the fact that when the file was examined prior to the first trial the card was not found in the file, and she testified that the card could have been misfiled in the office. [R. 86][1]

II.

Emphasis is placed upon the many different places where petitioner lived in Los Angeles after he returned from Modesto, California, and that he did not notify the board from February, 1955, until December, 1955, about these changes. See the brief of the United States at pages 8-9. This is immaterial because he had given his parents' address in San Diego.

III.

The Government, on page 14 of its brief, states that after June, 1954, petitioner began a new pattern "during the period in which he no longer hoped to be exempted." During this time petitioner was a pioneer full-time minister, as is shown in the record. [R. 104] Under the law at such time he was entitled to exemption, and it is contrary to the law for the Government to say that he "no longer hoped" to be exempted. (*Dickinson* v. *United States*, 346 U. S. 389 (1953)) As for what Venus hoped, there was no testimony about his hopes. The evidence is limited to his activity as a full-time minister. It is pure speculation for the Government to argue what petitioner's hopes were in the face of the record in this case. At that time his case was not being processed in the draft board but it was before the United States District Court at Los Angeles in a prosecution. Venus had good cause to believe that he would be exempted if reprocessed.—*Dickinson* v. *United States*, 346 U. S. 389 (1953).

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[1] Numbers appearing herein within brackets and preceded by "R." refer to pages of the printed record in this case.

IV.

At the bottom of page 15 it is argued by the Government that petitioner claims the right to file simultaneously various addresses with the board. This is not a true statement. In his letter of June 7, 1954, he merely mentioned two addresses, which is the same as was done in *Ward* v. *United States*, 344 U. S. 924 (1953). Rather than giving basis for impugning his motives in mailing the letter and claiming a scheme of failure to cooperate with the board this shows overzealousness on his part to comply with the law and be cooperative, as he usually had been, according to the testimony of the clerk. [R. 77]

V.

It is argued on page 16 of the Government's brief that the evidence refutes petitioner's contention that mail would have reached him through his parents' address in San Diego and that petitioner himself "recognized" that such address no longer sufficed. This statement is challenged as being absolutely incorrect. The letter of June 7, 1954, was sufficient to notify the board that he could be reached in care of his parents in San Diego.

VI.

The argument made at the bottom of page 16 attempts to generate a question of fact around the contents of the letter of June 7, 1954. The draft board file constituted documentary evidence. The letter of June 7, 1954, was a part of the document. The document cannot be impeached, as is attempted to be done by the Government. The letter as a part of the document constituted undisputed evidence. It is a mere question of law as to the construction of the document. It is not a question of fact.

VII.

The Government cites *Bartchy* v. *United States*, 319 U. S. 484 (1943); and *Ward* v. *United States*, 344 U. S. 924 (1953) (top of page 17), but fails to emphasize the important thing in those two cases. It is the viewpoint of the defendant that is crucial. See petitioner's main brief at pages 32-33.

VIII.

The argument of the Government at pages 20-22 is not contradicted. The act, however, is not one-sided. It was designed to protect the Government in time of peril and at the same time protect the rights of registrants. 50 U. S. C. App. § 451(c) (62 Stat. 604) says that there shall be a selection under the law "which is fair and just." This means that the rights of registrants under the law must be protected simultaneously with the execution of the process of selection. Registrants are not to be dealt with as though they were lawyers or registrants in administrative proceedings represented by counsel. (*United States ex rel. Berman* v. *Craig*, 207 F. 2d 888, 891 (3rd Cir. 1953); *United States* v. *Greene*, 220 F. 2d 792, 794 (7th Cir. 1955)) See also petitioner's main brief at pages 26-27.

IX.

The Government at the middle of page 23 of its brief quotes 32 C. F. R. § 1641.7(a), which provides that a registrant must give notice within ten days of any change in his "home address." Venus has always claimed San Diego as his home address. Modesto could not reasonably be considered as his home address. It would be unreasonable to argue that he considered the 1431 10th Street gymnasium in which he worked in Modesto as his home address. He merely had a place to sleep in the place where he worked. He resided in the gymnasium but his home address has always been San Diego. [R. 105] He never claimed Modesto as his home address. He merely gave his employer's address as his

temporary place of residence while working in Modesto. By no stretch of the imagination can this be considered to be his home address. The only time that he gave the board a notice of his *home* address was when he mailed the card from Los Angeles following the move made by his parents from one address to another address in San Diego. It was the San Diego address of the parents of Venus that was his home address and none other. He claimed the San Diego address as his home address in May, 1954, when he received the first notice to report for induction. He also claimed it when he was living at the many various addresses in Los Angeles doing "tree work" following his departure from Modesto in early February of 1955.

X.

The Government speaks of a "continuing obligation" on page 23 of its brief. There is no continuing duty involved in this case. The indictment was confined exclusively to the offense of failing to keep the local board informed and there was no allegation of continuing duty. Unless there was an allegation of a continuing duty it cannot be relied upon in cases of this sort.—*Graves* v. *United States*, 252 F. 2d 878 (9th Cir. 1958).

XI.

The Government in the same sentence on page 23 says that the regulations imposed a duty to keep the local board advised "at all times" where mail would reach him. It is submitted that "at all times" in this case the board was so advised that mail would reach Venus through his "home address" in San Diego, which satisfied the law fully.—See *Bartchy* v. *United States*, 319 U. S. 484 (1943); *Ward* v. *United States*, 344 U. S. 924 (1953).

XII.

In answer to the argument of the Government on page 23 of its brief about advising a location where mail would

reach the registrant, it should be remembered that the letter of June 7 gave two addresses: Modesto and San Diego. The testimony of the clerk was also that she knew that Venus could always be reached through the parents of Venus. [R. 68] The only reason the board did not attempt to reach him at his home address in San Diego was because the order was not returned from Modesto. [R. 69] While Venus was dealing with the United States Attorney, the United States Marshal and the Department of Justice under the first indictment he used his home address, that of his parents in San Diego. [R. 137-139]

XIII.

In the middle of page 24 it is stated that the issues in this case are primarily "factual matters within the province of the jury." This statement is true only insofar as the mailing of the card from Los Angeles to San Diego is concerned. It does not, however, apply to the construction and interpretation of the letter of June 7, 1954. This is a legal question that is exclusively for the court to determine and not for the jury.

XIV.

The Government at the bottom of page 25 states that there was a sudden reversal of scrupulous compliance after February 7, 1955, because Venus did not give any notice upon leaving Modesto. Emphasis seems to be placed upon the delay on the part of Venus in notifying the local board after leaving Modesto. The charge of the trial court was that a delay even until the 20th of February, 1955, in notifying the board was "not important." [R. 185] It was not the duty of petitioner to notify the local board when he left Modesto, but all that was required was to notify the board within a reasonable time after he arrived at his new address, according to the charge of the trial court, which would be anytime between February 8 and February 20.

[R. 185] Venus testified that he mailed the card from Los Angeles on February 19, 1955. [R. 106-110]

XV.

Emphasis is placed upon the testimony of the clerk that no card was received from petitioner in February, 1955, showing a change of address. (Government's brief, page 27) There is a frontal attack upon the testimony of the petitioner that he claimed to have mailed a card from Los Angeles in February, 1955, showing a change of address by reference to the testimony of the clerk that no card was received. The clerk did not testify categorically that "no postcard" was received in February of 1955. Her testimony was to the effect that the file was out of the office during that time [R. 81-83]; that there were between 13,000 and 14,000 files in the office [R. 85]; and that if the card were received it was possible that it could have been misfiled. [R. 86, 91] She never testified positively that no postcard was received. The effect of her testimony was only that she did not recall seeing a card in the file. [R. 86]

XVI.

The Government, at the bottom of page 27, makes reference to the search made by two clerks through 3,000 draft board files in an effort to locate the postcard. It is significant that this search was not made until more than five years after the postcard was mailed and only 3,000 of nearly 14,000 files were examined. [R. 90] This is a classic example of "too little too late." It is not sufficient to dispel the unequivocal testimony of the clerk that a mistake could have been made in filing the card. [R. 86]

XVII.

At the bottom of page 27 and top of page 28 the Government argues that the petitioner took no alternative action

to see to it that mail would reach him after he left Modesto. The testimony shows that the former employer of Venus would have forwarded mail to him at his home address in San Diego during February, 1955, and at any time up until April, 1955. [R. 131] It is submitted that the Government strains out the gnat and swallows the camel in an effort to make the Court believe that the petitioner gave Modesto as his home address.

XVIII.

On page 29 of the brief the Government says that the letter plainly reveals that Venus designated "Modesto as his principal and permanent address." This is unfair and an untrue interpretation of the letter in all the facts and circumstances and on the face of the letter itself. Venus was not a lawyer and he used the words "new address" in the June 7 letter purely in the sense that this would be the place where he would be physically present on and after June 7, 1954. The record clearly shows that the gymnasium in Modesto was not the home address of Venus. The place where he had to sleep in the gymnasium was not his home. It was merely a temporary abode in his employer's place of business and it is stretching reality too far to say that his cot in the gymnasium was equal to his home in San Diego. Surely petitioner did not intend, and the draft board did not believe, that this was the home address even though he mentioned the words "new address."

XIX.

In the middle of page 30 the Government asserts in effect that to sustain petitioner's position would be to allow registrants to simultaneously furnish various addresses and thereafter change addresses at will without notifying the board. This entire argument ignores the significance of the holding of this Court in *Bartchy* v. *United States*, 319 U. S.

484 (1943); and *Ward* v. *United States*, 344 U. S. 924 (1953). The petitioner did not simultaneously furnish "various addresses." He merely provided the board with his home address and the address of the place of his employment in Modesto where he would be working and sleeping. This certainly did not constitute a criminal scheme to evade the draft law, the position of the Government notwithstanding.

XX.

On the same page the Government suggests that a registrant can "complacently wait until the board had exhausted every possible source that might disclose his whereabouts." In this case there was no effort made to disclose the whereabouts of Venus as far as the board was concerned.

XXI.

In the same paragraph it is also said that to hold with petitioner would be to "place a premium on plain noncooperation," which is not the case here. Venus was ignorant of what was going on and was overly zealous in notifying the draft board by mail not only of his home address in San Diego but also of the address of his employer where he would be working and sleeping in another city.

XXII.

The Government, at page 31, says it has difficulty in understanding why the June 7 letter was sent at all if Venus intended to retain his parents' San Diego address as his mailing address. The regulations required him to give his home address. He did that by mailing to the board his San Diego address. This would have been sufficient. He was overzealous in wanting to be immediately informed by the board and so gave the address of the gymnasium where he was working in Modesto.

XXIII.

The Government makes a unique and extraordinary argument at pages 32-34. It is to the effect that since the jury found against the petitioner on the factual issue of whether he mailed the postcard from Los Angeles in February, 1955, such can be taken as further fact that the jury believed that he had criminal intent under all the circumstances not to keep the board informed of where mail would reach him in spite of the fact that he had on file the June 7 letter. Such type of piling inference upon inference in order to support a verdict of guilt is rejected by the law. It does not overcome the undisputed evidence, the letter of June 7.

XXIV.

The argument made by the Government regarding the instructions at pages 38-44 of the brief overlooks the real issue that the petitioner attempted to get before the jury but which was never allowed to go before it at the trial. The issue was that the jury should not confine its consideration alone to the failure of the clerk to find the card in the files of the local board or to a presumption that the draft board employees did their duty. There was the principal point that was relied upon by the Government in the trial of the case. It is the petitioner's contention that the jury should have been instructed that such facts alone are not sufficient in themselves to overcome the presumption of delivery of a regularly addressed and stamped postcard as in this case. The petitioner's theory of the case on this point was not properly and fully presented to the jury notwithstanding the instructions given by the court about the general presumptions of delivery.

CONCLUSION

Wherefore, for the reasons stated in petitioner's main brief and in this reply brief the judgment of the court below should be reversed and the cause remanded to the district court with instructions to sustain the motion for judgment of acquittal or in the alternative instruct that court to grant a new trial.

Respectfully submitted,

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